INDEX.

Caption ..... *a*
Names of Grand Jury and Finding a True Bill 1
Indictment 2
Arraignment of R. S. and A. F. Leovy, and Plea of Not Guilty 3
Case Called for Trial, Names of Jurors, Hearing and Continuance 3
Case Resumed, Names of Jurors, Hearing and Continuance 4
Case Resumed, Names of Jurors, Hearing and Continuance 5
Case Resumed, Names of Jurors, Hearing and Verdict 5
Sentence 6
Order—Time Allowed to Present Bills of Exception .. 7
Bills of Exceptions Presented in Open Court 7
Bill of Exceptions No. 1 7
Bill of Exceptions No. 2 8
Bill of Exceptions No. 3 9
Copy of Resolution Passed by Board of Commissioners for Buras Levee District, etc., on 20th November, 1897, Offered by Defendants, Marked "D" 13
Testimony Filed with Bill of Exceptions No. 2:
Testimony of William O'Brien for Plaintiff 15
Testimony of William Smith for the United States 18
Testimony of Patrick Callaghan for the United States 19
Testimony of R. H. White for the United States. 21
Testimony of John Collett for the United States. 25
Testimony of Marco Beneditich for the U. S 28
Testimony of Marco N. Beneditich for the U. S .. 31
Admission as to Red Pass, when Closed 31
Testimony of Luke Scovell for the U. S 35
Testimony of Michael Fanitivich for the U. S 36
Testimony of Bozzo Bogetto for the U. S 37
Testimony of Peter Stelelovich for the U. S 39
Testimony of Steffana Rusich for the U. S 41
Testimony of Sydney F. Lewis for the Defendant. 44
Testimony of John C. De Armas for Defendants .. 56

Testimony of George D. Osgood for the Defendants 65
Testimony of Frank G. Blase for the Defendant.. 69
Testimony of George Schomberger for Defendants 77
Testimony of Andrew Buras for Defendants..... 87
Testimony of Johnnie Gibbs for Defendants.... 94
Testimony of Theodore S. Wilkinson for Defendants 98
Testimony of Jack Stulich for Defendants..... 102
Testimony of Fred Tourney for Defendants..... 106
General Charge of the Trial Judge to the Jury..... 112
Letter of Secretary of War, Dated May 11, 1898, Addressed to Mr. J. Ward Gurley, U. S. Atty., East'n Dist. of La., Offered by the United States..... 116
Certain Map Issued by General Land Office at Washington, Etc., Offered by Defendants. (Note—Offer Withdrawn)..... 117
General Chart of the Coast, Showing Approaches to Mississippi River, Mobile Bay, and Atchafalaya Bay, Offered by Defendants 117
Map of Same Character, Except Larger, and Shows More Distinctly the Passes, Marked Coast Chart No. 194 of the Mississippi River, from Passes to Grand Prairie, Offered by Defendants... 118
Resolution Adopted by Police Jury of the Parish of Plaquemine Authorizing Closing of Red Pass, Dated July 1, 1890, Marked Exhibit "A," Offered by Defendants 119
Advertisement in Newspaper, Protector, October 26, 1895, Stating Mr. Robert S. Leovy was Syndic, Etc., Marked "B," Offered by Defendants..... 119
Resolution of Police Jury to the Parish of Plaquemine, Dated February 8, 1898, Marked "C," Offered by Defendants 119
Map of the State of Louisiana, Marked "L." Issued by General Land Office, Department of the Interior, Offered by Defendants 120
Survey of Lands Embraced in the Passes, Etc., Made by one Connolly in 1836, Under Authority, Marked "H," Offered by Defendants 120
Field Notes, Made in 1836, by Connolly, Marked "F," Offered by Defendants 121

Testimony of E. L. Corthell, Civil Engineer, Etc., Offered by the United States 122
Trial Judge's General Charge to the Jury 123
Special Charges Given by Trial Judge to the Jury at the Request of the Defendants 123
Trial Judge's General Charge to the Jury (made part of the Bill of Exception No. 3) 125
Special Instructions Given by Trial Judge to the Jury at the Request of Defendants (made part of Bill of Exceptions No. 3) 125
Petition for Writ of Error 125
Order on Petition 126
Assignment of Errors 126
Bond 129
Writ of Error 130
Indorsement on Writ of Error 131
Citation in Error 131
Proof of Service on Citation in Error .....
Clerk's Certificate 133

PROCEEDINGS IN U. S. CIRCUIT COURT OF APPEALS.

Argued in Part 134
Argument Concluded and Submitted 134
Judgment 134
Opinion of the Court 135
Certificate of Clerk 148

UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the third Monday of November, 1898, and held in the Courtroom of said Court, in the City of New Orleans.

Before the Honorable Don A. Pardee, United States Circuit Judge for the Fifth Judicial Circuit, the Honorable A. P. McCormick, United States Circuit Judge for the Fifth Judicial Circuit, and the Honorable Charles Swayne, United States District Judge for the Northern District of Florida.

Robert S. Leovy, Plaintiff in Error,

vs.

The United States, Defendant in Error.

Be it remembered, that heretofore, to-wit., on the 14th day of July, 1898, a transcript of the record of the above styled cause, from the Circuit Court of the United States for the Eastern District of Louisiana was filed in the office of the Clerk of said United States Circuit Court of Appeals, in the words and figures following, to-wit:

UNITED STATES OF AMERICA.

Circuit Court of the United States, Eastern District of Louisiana, New Orleans Division.

ROBERT S. LEOVY,
Plaintiff in Error,

versus

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 2245, Criminal Docket.

Messrs. H. J. LEOVY and VICTOR LEOVY, and ROUSE & GRANT, for Plaintiff in Error.

Messrs. J. WARD GURLEY, U. S. Attorney, Eastern District of Louisiana, and D. C. MELLEN, Assistant U. S. Attorney, Eastern District of Louisiana, for Defendant in Error.

Writ of Error from the United States Circuit Court of Appeals for the Fifth Circuit to the United States Circuit Court for the Eastern District of Louisiana (New Orleans Division), returnable within thirty (30) days from the 16th day of June, A. D. 1898, at the City of New Orleans, State of Louisiana.

No. 745. U. S. Circuit Court of Appeals. Filed July 14, 1898.
J. M. McKEE, Clerk,
By H. J. CARTER, Dep. Clerk.

TRANSCRIPT OF RECORD.

NAMES OF GRAND JURY AND FINDING A TRUE BILL.

Extract from the Minutes, April Term, 1897.

New Orleans, Wednesday, May 19, 1897.

Court met pursuant to adjournment:

Present, Hon. Charles Parlange, District Judge.

Present, J. Ward Gurley, Jr., U. S. Attorney.

The Grand Jury having been adjourned to this day the following members appeared and answered to their names, to-wit:

1. E. R. Chevalley,
2. Andrew J. Bacon,
3. John S. Amann,
4. Morris Garrot,
5. George F. Mugnier,
6. H. T. Rowland,
7. C. C. Morse,
8. J. J. Love,
9. D. T. Cummings,
10. Warren B. Reed,
11. James Gaines,
12. John F. Ober,
13. Foster DeBuys,
14. Henry Timmermann,
15. George S. Kausler,
16. John C. A. Sack,
17. Joseph Engelhardt,
18. Joseph Presas,
19. Horace F. Foster,
20. F. B. Nunn,
21. Henry G. Keneker,
22. Theodore Haller,
23. George W. Davison.

and thereupon the Grand Jury retired to their room to deliberate upon such matters as might be laid before them for investigation. The Grand Jury subsequently returned into Court and then and there returned the following indictment, to-wit:

INDICTMENT.

River and Harbor Act of Septr. 19, 1890, and Amendments Thereto, Secs. 7 and 10, Act of July 13, 1892, 27 Stats. at L. Ch. 158, Sec. 3, p. 110, Vol. 2. Sup. R. S. p. 30, Ch. 158.

The United States :
vs. : No. 2245.
Robert S. Leovy and Augustus F. Leovy. :

A true Bill:
May 19, 1897.

E. R. CHEVALLEY,
Foreman Grand Jury.

Whereupon on motion of the United States Attorney it was ordered that the Grand Jury be discharged to Friday, May 28, 1897, at 11 a. m.

Indictment, Filed May 19, 1897.

UNITED STATES OF AMERICA, :
Eastern District of Louisiana, : ss:
New Orleans Division. :

In the Circuit Court of the United States, in and for the New Orleans Division, and Eastern District of Louisiana, at the April Term thereof, A. D. 1897:

The Grand Jurors of the United States empaneled, sworn and charged at the Term aforesaid, of the Court aforesaid, upon their oath present:

That heretofore, to-wit: On the 16th day of November, A. D. 1895, and other days during said month of November, 1895, Augustus F. Leovy and Robert S. Leovy, both late of the parish of Plaquemine, State of Louisiana, in the said Division of said District and within the jurisdiction of said Court, to-wit: In the parish of Plaquemine, and State of Louisiana, unlawfully, wilfully, knowingly and without permission of the Secretary of War of the United States, did then and there build and cause to be built a dam in and across a certain navigable stream of the United States known as Red Pass, and outside of any established harbor lines, which said Red Pass flows into the Gulf of Mexico from a certain navigable stream of the United States known as the Jump, which said Jump is an outlet of the Mississippi river into the Gulf of Mexico; which said dam has been continued by the said Augustus F. Leovy and Robert S. Leovy since the same was built, as aforesaid, and still remains in and across said Red Pass, whereby the navigation of and commerce over and through said Red Pass, was then and there and has been ever since impaired and obstructed; they, the said Augustus F. Leovy and Robert S. Leovy, then and there well knowing the said Red Pass to be a navigable stream of the United States, in respect of which the said United States then and there had jurisdiction, contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

(Signed) D. C. MELLEN,
Asst. U. S. Attorney.

Endorsement on Indictment: No. 2245, Circuit Court of the United States for the Eastern District of Louisiana, New Orleans Division, The United States vs. Robert S. Leovy and Augustus F. Leovy. Indictment. River and Harbor Act of Sept'r. 19, 1890, and amendments thereto. Secs. 7 and 10, Act of July 13, 1892, 27 St. at L. Ch. 158 Sec. 3 p. 110, Vol. 2 Sup. R. S. p. 30 Ch. 158. A true bill, May 19th, 1897. E. R. Chevalley, Foreman Grand Jury. Filed May 19, 1897. H. J. Carter, Dy. Clerk. J. W. Gurley, Jr., U. S. Attorney for Eastern Dist. of La.

ARRAIGNMENT OF R. S. LEOVY AND A. F. LEOVY, AND PLEA OF NOT GUILTY.

Extract from the Minutes, April Term, 1898.

New Orleans, Wednesday, June 1, 1898.

Court met pursuant to adjournment:
Present, Hon. Charles Parlange, District Judge.

The United States	:	
vs.	:	No. 2245.
R. S. Leovy and A. F. Leovy.	:	

R. S. Leovy and A. F. Leovy, the accused herein, being this day arraigned at the bar of the Court, waived the formal reading of the indictment herein found and presented against them on the 19th day of May, 1897, and pleaded not guilty thereto.

Whereupon it was ordered that the said plea be recorded and it is done accordingly.

CASE CALLED FOR TRIAL, NAMES OF JURORS, HEARING AND CONTINUANCE.

Extract from the Minutes, April Term 1898.

New Orleans, Wednesday, June 1, 1898.

Court met pursuant to adjournment:
Present, Hon. Charles Parlange, District Judge.

The United States :
vs. : No. 2245.
R. S. Leovy and A. F. Leovy. :

This cause was called for trial.

Present, J. Ward Gurley, U. S. Attorney, and D. C. Mellen, Asst. U. S. Attorney, who prosecute for and on behalf of the United States;

H. J. Leovy, Rouse & Grant, V. Leovy, counsel for the accused and the accused, R. S. Leovy and A. F. Leovy in person, who stand charged with unlawfully, wilfully, knowingly and without permission of the Secretary of War of the United States, building and cause to be built a dam in and across a certain navigable stream of the United States known as Red Pass; in violation of River and Harbor Act of September 19, 1890, and amendments—Secs. 7 and 10 Act of July 13, 1892, 27 St. at Large, etc.

Whereupon the following jurors were called and sworn to well and truly try the issue joined herein, to-wit:

1. Jas. Miltenberger,
2. C. Metesser,
3. Thos. Labatut,
4. S. S. Francisco,
5. L. Gerteis,
6. C. C. Diboll,
7. E. Duconge,
8. Thos. Hackett,
9. John M. Darmes,
10. Hy. W. Crozat,
11. M. M. Fuller,
12. J. Brulatour,

when the Court appointed Jas. Miltenberger foreman of the Jury and the trial was proceeded with.

After hearing the evidence and testimony in part, it was ordered that the cause be continued until to-morrow at 11 a. m.

CASE RESUMED, NAMES OF JURORS, HEARING AND CONTINUANCE.

Extract from the Minutes, April Term 1898.

New Orleans, Thursday, June 2, 1898.

Court met pursuant to adjournment:
Present, Hon. Charles Parlange, District Judge.

The United States :
vs. : No. 2245.
R. S. Leovy and A. F. Leovy. :

This cause as continued from yesterday was this day re-

sumed, and the accused, R. S. Leovy and A. F. Leovy, and the counsel for the parties as well as the jurors empaneled in the cause, viz: James Miltenberger, C. Metesser, Thos. Labatut, S. S. Francisco, L. Gerteis, C. C. Diboll, E. Duconge, Thos. Hackett, John M. Darms, Hy. W. Crozat, M. M. Fuller and J. Brulatour, being all present, the trial was proceeded with. After hearing further evidence and testimony it was ordered that the cause be continued until tomorrow at 11 a. m.

CASE RESUMED, NAMES OF JURORS, HEARING AND CONTINUANCE.

Extract from the Minutes, April Term 1898.

New Orleans, Friday, June 3, 1898.

Court met pursuant to adjournment:
Present, Hon. Charles Parlange, District Judge.

The United States	:	
vs.	:	No. 2245.
R. S. Leovy and A. F. Leovy.	:	

This cause as continued from yesterday was this day resumed and the counsel for the respective parties, the accused, R. S. Leovy and A. F. Leovy as well as the Jurors empaneled in the cause, to-wit: James Miltenberger, C. Metesser, Thos. Labatut, S. S. Francisco, L. Gerteis, C. C. Diboll, E. Duconge, Thomas Hackett, John M. Darms, H. W. Crozat, M. M. Fuller and J. Brulatour being all present the trial was proceeded with.

After hearing further evidence and testimony and arguments from counsel, it was ordered that the cause be continued until Monday, June 6, 1898, at 11 a. m.

CASE RESUMED, NAMES OF JURORS, HEARING AND VERDICT.

Extract from the Minutes, April Term 1898.

New Orleans, Monday, June 6, 1898.

Court met pursuant to adjournment:
Present, Hon. Charles Parlange, District Judge.

The United States	:	
vs.	:	No. 2245.
R. S. Leovy and A. F. Leovy.	:	

The cause as continued from Friday last, was this day resumed and the accused, R. S. Leovy and A. F. Leovy and their counsel and the counsel for the United States, as well as the Jurors empaneled in the cause, to-wit: Jas. Miltenberger, C. Metesser, Thos. Labatut, S. S. Francisco, L. Gertels, C. C. Diboll, E. Duconge, Thos. Hackett, John W. Darms, Hy. W. Crosat, M. M. Fuller and J. Brulatour, being all present, the trial was proceeded with.

After hearing the closing arguments of counsel and receiving a charge from the Court, the Jury retired to deliberate as to their verdict. After due deliberation the said Jury returned into Court and then and there in open Court through their foreman, in presence of the accused and their counsel and the counsel for the United States, did render and deliver the following verdict, to-wit:

We, the Jury, find Augustus F. Leovy not guilty.

We find Robert S. Leovy guilty as charged, and we strongly recommend him to the mercy of the Court.

JAMES MILTENBERGER,
Foreman.

New Orleans, June 6th, 1898.

and thereupon it was ordered that the said verdict be recorded and it is done accordingly.

And the Jury was discharged from further consideration of the cause.

And, considering the verdict of not guilty as to the said Augustus F. Leovy, it is ordered that he be discharged without day in this behalf. It is further ordered that Robt. S. Leovy be remanded.

SENTENCE.

Extract from the Minutes, April Term, 1898.

New Orleans, Monday, June 6th, 1898.

Court met pursuant to adjournment:
Present, Hon. Charles Parlange, District Judge.

The United States	:	
vs.	:	No. 2245.
R. S. Leovy and A. F. Leovy.	:	

Robert S. Leovy, one of the defendants herein, having

been heretofore duly indicted and arraigned, and afterward, to-wit: on the 6th day of June, 1898, tried on the said indictment and found guilty by the Jury of the charges preferred against him in the said indictment, viz: Unlawfully, wilfully, knowingly and without permission of the Secretary of War of the United States, building and causing to be built, a dam in and across a certain navigable stream of the United States known as Red Pass; in violation of Act of Congress of Sept. 19, 1890, and amendments thereto, Secs. 7 and 10, Act July 18, 1892, 27 Stats. at Large, etc.; and being this day present in Court was called to the bar of the Court for judgment, and being asked if he had anything to say why sentence should not be pronounced against him he failed to urge any reason good and sufficient in law:

It is considered and adjudged by reason of the verdict of guilty as aforesaid, that the said Robert S. Leovy do pay a fine of two hundred dollars ($200.00) and costs of prosecution.

ORDER—TIME ALLOWED TO PRESENT BILLS OF EXCEPTION.

Extract from the Minutes, Monday, June 6th, 1898.

U. S. vs. R. S. Leovy, et al. No. 2245.

Ordered that defendants' counsel have 30 days from date to present their bills of exceptions herein taken.

BILLS OF EXCEPTIONS TAKEN BY COUNSEL FOR DEFENDANT, PRESENTED IN OPEN COURT.

Extract from the Minutes, Thursday, June 16, 1898.

United States vs. R. S. Leovy. No. 2245.

This day counsel for the defendant herein in open Court presented their bills of exceptions taken during the trial of this cause.

Bills of Exception, Filed June 6, 1898, *nunc pro tunc.*

BILL OF EXCEPTIONS NO. 1.

United States Circuit Court, Eastern District of Louisiana.

The United States :
vs. : No. 2245.
Augustus F. Leovy and Robert S. Leovy. :

Be it remembered, that upon the trial of this cause before the Jury on the 3rd day of June, 1898, the defendants offered in evidence a duly certified copy of a resolution passed by the Board of Commissioners for Buras Levee District, at a meeting thereof, held on the 20th of November, 1897; said Board of Commissioners of said Buras Levee District, being a body corporate under the laws of Louisiana, whose duties and powers are defined by law.

To the introduction of which resolution in evidence the United States Attorney, prosecuting in behalf thereof, objected on the ground that it was irrelevant, which objection was sustained by the Court, and such evidence excluded from the jury.

To which ruling of the Court and the exclusion of said evidence, the defendants then and there excepted and still except, and annex hereto said resolution, marked Buras, and make the same part of this bill, and ask the Court to sign this their bill of exception, which is done accordingly.

This bill was duly and seasonably presented and is signed and ordered filled *nunc pro tunc* as of June 3, 1898.

(Signed) CHARLES PARLANGE,
U. S. Judge.

BILL OF EXCEPTIONS NO. 2.

Filed June 22, 1898, as of date June 6, 1898, nunc pro tunc.

United States Circuit Court, Eastern District of Louisiana.

The United States :
vs. : No. 2245.
Augustus F. Leovy and Robert S. Leovy. :

Be it remembered, that on the 6th day of June, 1898, on the trial of this case before the jury, duly empaneled and sworn, and after all the evidence on behalf of the said United States, as well as on behalf of said defendants, had been introduced before the jury and concluded; and the case had been argued before the jury by the counsel for the said United States and the counsel for the said defendants,

said defendants then and there, in the presence of the jury, and before they retired to consider their verdict, specially requested the Court, that upon consideration of the whole evidence adduced upon the trial of the cause, the Court direct the jury to acquit the defendants.

Which direction, the Court then and there refused to give.

To which refusal so to instruct the jury, said defendants then and there, in the presence of the jury, and before they had retired to consider their verdict, excepted and still except; and they annex to this their bill of exceptions, a transcript of all the evidence and testimony adduced before said jury on the trial of said case, and make the same a part of this their bill of exception, and request the Court to sign the same, which is done accordingly.

The trial Judge makes his general charge to the jury a part of this bill and also all the special charges which he gave the jury at the request of the defendants.

This bill was duly and seasonably presented to me and is now signed and ordered filed *nunc pro tunc* as of June 6, 1898.

(Signed) CHARLES PARLANGE,
U. S. Judge.

BILL OF EXCEPTIONS NO. 3.

United States Circuit Court, Eastern District of Louisiana.

The United States	:	
vs.	:	No. 2245.
Augustus F. Leovy and Robert S. Leovy.	:	

Be it further remembered, that the evidence being as shown by the full transcript thereof annexed to Bill of Exceptions No. 2; and the jury still being present, not having yet retired to consider their verdict, said defendants then and there requested the Court to instruct the jury as follows, to-wit: "If the jury shall find that Red Pass is not a natural stream, but simply the result of a crevasse, or outbreak of the Mississippi river, from its natural channel, they must acquit the defendants."

The Court then and there refused to so instruct the jury.

To which refusal, said defendants then and there excepted and still except.

Be it further remembered, that the evidence being as shown by the full transcript thereof annexed to Bill of Exceptions No. 2. And the evidence and arguments having been concluded, and the jury still being present, said defendants then and there requested the Court to instruct the jury as follows, to-wit: "If the jury shall find that Red Pass was a crevasse, or outbreak of the Mississippi river from its natural channel, the result of which was to overflow a large portion of Plaquemine parish to the detriment of the inhabitants thereof by the destruction of their property and prejudicial to their health, the State, in the exercise of its police power delegated to the Police Jury of the Parish of Plaquemine, had a right to close it."

But the Court refused to so instruct the jury. To which refusal, said defendants then and there excepted and still except.

And thereupon said jury still being present, and the evidence aforesaid having been adduced before them, the defendants further requested the Court to instruct the jury as follows: "If the jury shall find, that Red Pass is a crevasse, or outbreak of the Mississippi river from its natural channel and overflowed the lands situated on the banks of Red Pass, and that its closing was necessary to reclaim, drain, or levee said lands, or any of them, then it was the duty of the State under the Acts of Congress of 1849 and 1850 to close Red Pass."

But the Court refused so to instruct the jury. To which refusal the defendants then and there excepted and still except.

And be it further remembered, that upon the trial of this cause before said jury, the evidence being as shown by said full transcript thereof; and the evidence and argument on both sides having been concluded, the jury still being present, the said defendants requested the Court to instruct the jury as follows:—

"Unless the jury shall be satisfied, from the evidence that Red Pass was, at the time when it was closed, as alleged in the indictment, substantially useful to some purpose of interstate commerce, the jury are instructed, that any Federal legislation, purporting to prohibit, or prevent, or interfere with the closing of said stream, would be beyond the powers granted to the Congress of the United States, by Art. I, Sec. 9 of the Constitution, or otherwise vested by the Constitution of the United States in Congress, and would

be contrary to Amendment 10 of the Constitution of the United States. And the jury are instructed, that the defendants claiming and being entitled to the protection of that Constitution, must be acquitted."

But the Court refused so to instruct the jury, because, among other reasons, the closing part of the instruction directs the acquittal of the defendants. To which refusal said defendants then and there excepted and still except.

And be it further remembered, that the evidence, being as shown by said full transcript thereof; and the evidence and arguments having been closed, the jury still being present, the defendant, Robert S. Leovy, requested the Court to instruct the jury as follows:—

"If the jury shall find, that the dam constructed at the mouth of Red Pass, was constructed by authority of the Police Jury of the Parish of Plaquemine, and that the defendant Robert S. Leovy was an officer of said parish, and in constructing said dam, was acting as such under authority of the Police Jury thereof, they must acquit him."

But the Court refused so to instruct the jury. To which refusal said defendant then and there excepted and still excepts.

Be it further remembered, that upon the trial of this cause, on the 6th day of June, 1898, after all the evidence had been adduced on behalf of the prosecution, and of the defendants, and the arguments of counsel for both parties had been concluded; and the evidence being as shown by said full transcript thereof, and the jury still being present, not yet having retired to consider their verdict; and the Court delivering orally its charge to said jury, charged the jury as follows, towit:—

"I wish also to say, that the question whether some 60 years ago, the Jump, resulted from the enlargement of some canal, which was then in existence, or as has been contended here, was a crevasse in that sonse of the word, you are not to consider at all. As you have been appealed to in the argument to consider that this question involved the right of the State to close a gap in its levees, I say, that you have nothing of that sort to consider. I repeat to you, that whether or not, 63 years ago, the Jump was formed in the manner in which it was contended it was, is not a matter for your consideration."

To which instruction to the jury, the defendants then and there excepted and still except.

And thereupon, said Court further charging said jury,

which was still present, and had not yet retired to consider its verdict, instructed them as follows, to-wit: "I charge you gentlemen, that the Police Jury of the Parish had no right to authorize Mr. Robert S. Leovy to dam Red Pass if Red Pass was a navigable water of the United States. I say that it had no authority, because in the year 1890, the Congress of the United States passed the law under which this indictment has been brought, forbidding the damming of any navigable stream of the United States, without the previous authorization of the Secretary of War. Therefore, as it is not contended in this case, that there was any authority from the Secretary, but on the contrary there is proof tending to show there was no such authority, then it results, that it is no defense for Mr. Robert S. Leovy to show his pretended or alleged authority from the Police Jury of the Parish of Plaquemine. The Police Jury of the Parish of Plaquemine could not lawfully have dammed it, therefore, Mr. Leovy could not."

To which instruction so given to the jury, the defendants then and there excepted and still except.

And the Court further charging the jury, the jury still being present not yet having retired to consider their verdict, said Court instructed the jury, as follows, to-wit:—

"What is a navigable water of the United States? It is a navigable water, which, either of itself, or in connection with other water, permits a continuous journey to another State. If a stream is navigable, and from that stream you can make a journey by water, by boat, by one of the principal methods used in ordinary commerce to another State from the State in which you start on that journey, then, it is a navigable water of the United States. It is so called, in contradistinction to waters which arise and come to an end within the borders of a State. * * * But if, from the water in one State, you can travel by water continuously to another State, and the water is a navigable water, then it is a navigable stream of the United States. * * * If it was navigable, and connected with waters that permitted a journey to another State, then it is a navigable water of the United States. And in this case, if it was navigable, it would be a navigable water of the United States, or might be so, in two ways: by connecting with the waters of the Gulf, if you should find it connected that way, or by connecting with the water of the Mississippi. I mean to say, that if there is evidence here that you could leave the Mississippi river and go into the

Jump and then go to the place where this dam was built by Mr. Robert S. Leovy, and some distance beyond that, and that it was navigable for boats or vessels carrying on commerce, then it would be a navigable water of the United States, because it would connect with the Mississippi, and from the Mississippi, you could go to other States of the Union. I say again, that it might connect in another way. It might connect through the Gulf. But the fact that I wish to impress upon you is this; that it is not absolutely necessary that you should find that there was navigability all the way from the Jump out to the Gulf, because, if from some point beyond the place where Mr. Robert S. Leovy built this dam, towards the Mississippi river, the stream was navigable, then it would be a navigable stream of the United States, because it would connect with the Mississippi river."

To which instruction, so given to the jury, the defendants then and there excepted and still excepts, and prayed the Court to sign this their bill of exception, which was done accordingly.

The trial Judge makes his entire general charge to the jury a part of this bill in order that the whole may be taken in connection with the foregoing excerpts. The trial Judge also makes part hereof all of the special instructions which he gave to the jury at the request of the defendants, viz: Defendants' Special Charges Nos. 2, 3 and 4 on file.

This bill was duly and seasonably presented to the trial Judge and is signed and ordered filed *nunc pro tunc* as of June 6, 1898.

(Signed) CHARLES PARLANGE,
U. S. Judge.

COPY OF RESOLUTION PASSED BY THE BOARD OF COMMISSIONERS FOR BURAS LEVEE DISTRICT, AT A MEETING THEREOF, HELD ON THE 20th OF NOVEMBER, 1897.

Offered by defendants and filed June 2, 1898, marked, in blue pencil, "D," referred to in, and made part of, Bill of Exception No. 1, and marked "Buras."

Office of Board of Commissioners of the Buras Levee District.

Buras P. O., La., ——— 189

Resolution adopted by the Board of Commissioners for

the Buras Levee District at a meeting held in Buras, La., on Saturday, Nov. 20th, 1897:

Be it resolved, That whereas Robt. S. Leovy, Syndic of the Fifth Ward of the Parish of Plaquemine, under and by virtue of a resolution passed by the Police Jury of the Parish of Plaquemine on July 1st, 1890, has closed Red Pass, a branch of the Jump; a crevasse from the Mississippi river; and the closing of said Pass has drained and redeemed a large tract of land and made them valuable and taxable and has been of great benefit to the property holders in the vicinity and has greatly improved the drainage of property extending many miles up the river;

Be it resolved, That the closing of Red Pass is hereby approved and ratified.

Be it further resolved, That in view of the fact that a suit is now pending in a Federal Court for the purpose of reopening Red Pass and since the said Pass is a part of the Buras Levee District, the Board protests against the said reopening of Red Pass; a crevasse which if accomplished would be seriously detrimental to all property interested of the lower portion of the district.

I do hereby certify that the above and foregoing is a true copy from the minutes; in faith whereof I set my hand and seal this 22nd day of November, 1897.

[Seal] (Signed) J. B. FASTERLING, Sec.

TESTIMONY FILED WITH BILL OF EXCEPTIONS NO. 2, JUNE 6, 1898, NUNC PRO TUNC.

United States Circuit Court, Eastern District of Louisiana.

The United States	:	
vs.	:	No. 2245.
Augustus F. Leovy and Robert S. Leovy.	:	

Index.

* * * * * * * * * * * * * * * * * *

The following testimony, together with all maps, documents and other papers filed in evidence on the trial of said suit, constitute all the evidence heard upon said trial and all of the same is annexed to and made part of Bill of Exceptions No. 2.

Signed and ordered filed *nunc pro tunc* as of June 6, 1898.

(Signed) CHARLES PARLANGE,
U. S. Judge.

* * * * * * * * * * * * * * * * * * *

New Orleans, La., June 1st, 1898.

The Court met this day pursuant to adjournment; present, his Honor Charles Parlange, Judge, with a jury.

Present, J. Ward Gurley and D. C. Mellen, United States Attorneys for the United States, plaintiff,

Leovy & Leovy and Rouse & Grant, Esqrs., for the defendants.

And after the jury had been empaneled and sworn, the following proceedings were had:

WILLIAM O'BRIEN, sworn for the plaintiff, says:

By Mr. Mellen:

Q. What is your occupation?

A. I am a fisherman and hunter, and general workman at anything.

Q. Where do you live? A. At Buras, Louisiana.

Q. What parish is that in? A. Plaquemine parish.

Q. That is right at the Jump, is it not? A. Yes, sir.

Q. Do you know the defendants, Mr. Augustus F. Leovy and Mr. Robert S. Leovy?

A. Yes, sir; I am acquainted with them.

Q. Do you know anything about the damming of Red Pass?

A. Yes, sir; I worked on the dam.

Q. You worked on the dam? A. Yes, sir.

Q. Whom did you work for; who employed you?

A. I worked for Mr. Leovy.

Q. Which Mr. Leovy? A. Mr. R. S. Leovy and Mr. Augustus Leovy, I suppose; that is where I got the money from; I worked for both of them.

Q. And you got your money from them?

A. Yes, sir; they paid me.

Q. For working upon this dam? A. Yes, sir.

Q. When was that dam put across Red Pass? A. I think it was in 1895.

Q. Can you tell us about when; what part of 1895?

A. It was September or October, I am not certain which.

Q. Are you sure that it was in 1895?

A. Well, I think it was about three years ago, this com-

ing fall, about three years ago. It was closed, I think, then.

Q. Do you recollect about what month it was?

A. I should think it was in September or October, if I am not mistaken, I did not keep count of it.

Q. You did not keep a record of that fact? A. No, sir.

Q. Just state where Red Pass is, where you were working?

A. I was working at the dam; I suppose it was from the mouth of the Pass, it may be four hundred feet inside, from the mouth proper.

Q. Where is the mouth of the Pass?

A. The mouth of the Pass opens on to the mouth of the main pass; the main pass runs in from the river.

Q. What do you call the main pass?

A. The main pass is the pass that runs through the whole.

Q. What is it called? A. It is called the Jump.

Q. Then the Red Pass, A. Is a branch of the Jump.

Q. Is a branch of the Jump? A. Yes, sir.

Q. How wide is Red Pass, where you were damming?

A. Well, I should think it is, right about where the dam is across, about 140 to 150 feet wide.

Q. How deep is it there?

A. Well, where the dam is, I put a seine across it a few days afterwards and the water was about four feet, well four and a half feet of water; the water was up to that part of it, not all the way across, but in the middle of the channel.

Q. Were there others working there at the same time, with you?

A. Yes, sir.

Q. How many?

A. Well, I do not know how many were working there, I worked three days and a half on it.

Q. You worked three days and a half? A. Yes, sir; on it.

Q. How far advanced was the dam, when you started to work there?

A. Well, the spiling and all that had been in it, until the wheeling was commenced, until they commenced to wheel dirt in.

Q. The piles had been driven then? A. Yes, sir.

Q. Do you know who employed the other workmen who were working there?

A. A day or two before I went to work there, there was

a man named John Collet went through there with a lugger.

Q. He went through there with what? A. A boat, a lugger.

Q. Was the lugger loaded? A. Yes, sir.

Q. With what? A. He had oysters in it.

Q. Do you know how much the lugger was drawing?

A. Well, I do not exactly know, she may have been two and a half feet, she could not draw much less, maybe more, I do not know.

Q. The dam then was not quite completed?

A. Well, they were driving the piling, and sheathing, and they let her go through, but that was the last boat that was let go through to my recollection.

Q. Did he ever come back?

A. Yes, sir; he came back again, the next day, I think.

Q. How did he come back?

A. He came back through the pass; when he went out, he went over and got his oysters out and came back, on the ground.

Q. Were these defendants, or not, around there, when the work was going on?

A. Well, Mr. Leovy used to come there once in a while; he had a man superintending the work for him.

Q. What was that man superintending the work, who was he?

A. Well, he goes by the name of Bob Button; I do not know whether that is his name or not.

Q. Which Mr. Leovy used to come there?

A. Mr. Robert Leovy used to come down there, and Mr. Augustus Leovy used to come down there and look on and go away again.

Q. Did they give any instructions, or orders?

A. Well, I do not know; they never gave me any.

Cross-examined by Mr. Leovy:

Q. How long have you been living down there in the vicinity of Red Pass?

A. I have been living down there since it was there; I suppose, I will say 23 years.

Q. Are you on friendly terms with Mr. Augustus F. Leovy?

A. I am not on unfriendly terms, I have nothing against him.

Q. Are you on speaking terms with him?

A. Well, no, sir; he has not spoken to me since the last election.

Q. Were you on speaking terms with him before?

A. Yes, sir.

Q. Is he not on speaking terms with you?

A. Not since the last election.

Q. He has not been on speaking terms with you since the last election?

A. No, sir, Mr. R. S. Leovy speaks to me, but Augustus Leovy, no sir.

Q. You spoke of a boat going through Red Pass after the piles had been driven in it; was that boat going from the river to the Gulf?

A. Yes, sir; going from the river to the Gulf.

Q. With oysters in it? A. Yes, sir; the boat was going from the river to the Gulf.

Q. You say she was taking oysters to the Gulf?

A. She was taking with he— I do not know whether he was taking them around to his bedding ground, or not; he was taking them to the east bay; I do not know where he got the oysters from.

Q. Was not that a flat bottom skiff?

A. I do not know exactly that it was.

Q. She came back empty? A. I do not know.

Q. How long after she went through was it before she came back?

A. It was the next day, if I am not mistaken.

WILLIAM SMITH, sworn for the United States, says:

By Mr. Mellen:

Q. What is your occupation? A. A grocer.

Q. Where do you live?

A. A grocer down at Goatville, about half a mile below Fort Jackson.

Q. Do you know the defendants, Robert S. Leovy and Augustus F. Leovy?

A. Yes, sir; I do.

Q. Do you know anything about the damming of Red Pass?

A. Yes, sir; I know it was dammed there by Mr. Leovy.

Q. You know it was dammed by Mr. Leovy? A. Yes, sir.

Q. Which Mr. Leovy?

A. Mr. Augustus F. Leovy, both son and father, I suppose; they are both in the business.

Q. Did you have anything to do with the damming of Red Pass? Did you work on it? A. No, sir.

Q. How do you know he had it dammed?

A. By these laborers who were working there; I walked down there myself and saw the laborers working on the dam.

Q. You walked there and saw the laborers working on the dam? A. Yes, sir.

Q. When was that?

A. About two years ago, somewhere around there, I should judge.

Q. Can you recollect the date it was, what month, or year?

A. Well, it must have been in October, sometime.

Q. You say that you saw the work going on?

A. Yes, sir; by the men of the Jump down there, working on the Jump.

Q. By the men of the Jump? A. Yes, sir; the laborers.

Q. Do you know who employed the laborers?

A. Only what they told me, Augustus F. Leovy; I never saw them personally, or anything of that kind, but Augustus F. Leovy.

Q. Did you see the defendants, or either of them there, while the work was going on? A. No, sir; I did not.

Q. Do you know who paid the laborers? A. No, sir; I do not.

Q. Did you state what month and year that was?

A. No, sir; I do not know exactly what year, or what month it was, I did not keep the run of it.

Q. Do you know the year?

A. I think about two years ago, somewhere around there; I never kept strict count of it, only passing by, I do not remember.

PATRICK CALLAGHAN, sworn for the United States, says:

By Mr. Mellen:

Q. Where do you live? A. In the parish of Orleans.

Q. Here, in this city? A. Yes, sir.

Q. Do you know either of the defendants, the Mr. Leovys?

A. Yes, sir; I know both of them.
Q. You know both of them?
A. Well, I know his brother for years, since he was a boy in the parish of Plaquemine.
Q. Whom do you say you have been acquainted with for years?
A. Mr. Leovy, down below that lives on the coast.
Q. This gentleman here? A. Yes, sir.
Q. Are you acquainted with his son, Mr. R. S. Leovy?
A. Yes, sir.
Q. You know both of them?
A. Yes, sir; I lived right abreast of them; I do not now.
Q. You lived down there?
A. Yes, sir; up until 1893, after the hurricane.
Q. Do you know anything about the damming of Red Pass?
A. Yes, sir; I did not see it closed, I do not know anything about the closing of it, I have not been there since.
Q. Do you know who had it closed?
A. No, sir; only by hearsay; I do not know who closed it.
Q. What was your business when you were down there?
A. I had orange trees and a truck farm and run a trading boat to Pilot Town, all the way down.
Q. Are you acquainted with Red Pass? A. Yes, sir.
Q. Did you ever go through Red Pass with your boat?
A. No, sir; never went clean through but once, that is some years ago; that was at night, when I could not take observations, in the back part of it.
Q. What sort of a boat did you go in?
A. A small little yawl boat, turned into a gaff sail boat.
Q. Do you know how much water she drew?
A. I cannot say, because I was going round there on a special trip; I cannot say how much water she drew.
Q. Did you go all the way from the Jump?
A. Yes, sir; from the point to Bayou Cook; I do not know about that part of the country except to go down the main pass, selling stuff, potatoes, vegetables and beef.
Q. Do you know anything about who paid the laborers?
A. No, sir; I do not know anything at all, except hearsay, nothing at all about who closed it or staubed it, or anything, only hearsay.

Cross-examined by Mr. Mellen:

Q. Are you on friendly terms with Mr. Augustus F. Leovy?

A. I used to be; I do not know what cause I should not; I was a neighbor of his and traded backward and forward, and sold him goods; and I do not see why I should not be on good terms with him.

Q. You have not lived there since 1893?

A. No, sir; except to go down to the Jump once in a while.

Q. You do not know anything about the closing of Red Pass?

A. No, sir; I did not see it closed; it was closed, but I do not know anything about the closing of it.

Q. You have not been through Red Pass since 1891?

A. I did not say any such thing, I said I only went once through.

Q. I understood you to say you went through it in 1891?

A. No, sir; I did not say any such thing, I said I went once clean through it with another man in a small little yawl boat, rigged into a gaff sail, but went clean round to Bayou Cook.

Q. When was that, when you went through there with another man in a small boat?

A. That was about, I guess, in 1864, I guess about the neighborhood of 1864.

R. M. WHITE, sworn for the United States, says:

By Mr. Mellen:

Q. What is your occupation? A. I have been contracting in business.

Q. Where do you live?

A. The parish of Plaquemine, at present, in this State.

Q. Do you know the defendants? A. Yes, sir.

Q. The two Mr. Leovys? A. Yes, sir.

Q. Do you know anything about the damming of Red Pass?

A. Yes, sir; I know it was dammed.

Q. You know it was dammed, when was it dammed?

A. Something about three years ago, or less than three years.

Q. Do you know what month and what year? A. In 1895, I think.

Q. What part of 1895?

A. In the fall of the year, October or November, I am not positive.

Q. Do you know who dammed it?

A. Well, Mr. Leovy and his son had it dammed.

Q. Mr. Leovy and his son? A. Yes, sir.

Q. You mean the defendants here? A. Yes, sir.

Q. Was the dam, or not, put clear across the stream?

A. Clear across, right straight across.

Q. Since the damming of the stream, has any boat been able to go through there? A. No boat can pass through.

Q. How long have you been acquainted with that country down there?

A. Since 1875.

Q. Do you know anything yourself, about the navigability of Red Pass?

A. Yes, sir; I know we have taken out willows on barges drawing four or five feet of water, by the tugboat.

Q. When was that?

A. A little over four years ago; I had barges of willows towed out of that pass by tugs, and they were drawing four or five feet of water.

Q. Did you see luggers going through there? A. Yes sir.

Q. Did they go through to the Gulf?

A. Yes, sir; they went round to the westward, and I did not see them returning.

Q. You saw them passing to the westward, and did not see them returning? A. Yes, sir.

Q. If they had returned; if they had been unable to get through and had returned, would you have known it?

A. Unless they passed through in the night I would have seen them; I would not have seen them then, I would be in bed.

Q. Explain where Red Pass is.

A. It is about half a mile inside the mouth of the Jump and runs about west southwest for nine miles to East Bay into the Gulf of Mexico.

Q. In the parish of Plaquemine?

A. Yes, sir; it runs west, southwest, in that direction about nine miles, where it empties into the Bay, being a short cut to the westward.

Cross-examined by Mr. Leovy:

Q. How long have you known Mr. A. F. Leovy? A. I suppose 17 or 18 years.

Q. Have you not had quarrels with Mr. A. F. Leovy for the last five years, about lands down there in litigation?

A. Not with Mr. Augustus Leovy; there were some disputes between you and I.

Q. With some of the Leovys, you had some litigation about land?

A. Yes, sir; before the closing of that bayou, before I ever had words with you, eight years ago.

Q. You state that for four or five years you had litigation with Mr. A. S. Leovy, growing out of titles to lands which you claimed to own?

A. Yes, sir.

Q. Have your relations ever been friendly with Mr. Leovy?

A. Yes, sir.

Q. Now, I want to ask you, did you ever go through Red Pass into the Gulf yourself? A. No, sir; I never did, not the whole way.

Q. I am not asking you about the whole way.

A. No, sir; I did not go through into the Gulf.

Q. You never went through into the open Gulf?

A. No, sir.

Q. You went how far? A. Four or five miles.

Q. You went into Red Pass four or five miles?

A. Yes, sir; or Tonfine Pass, which is a part of it.

Q. You went down four or five miles for the purpose of getting willows for the jetties? A. Yes, sir.

Q. Did you ever see boats pass through loaded with oysters?

A. Yes, sir; I seen boats loaded go through.

Q. Did you see them loaded with oysters going into the Gulf?

A. I saw them going down there, going westward, and I was told there were oysters on board of them.

Q. But you do not know that yourself?

A. I did not go on board of them, but I saw them loaded down pretty deep.

Q. Going with oysters down to the Gulf?

A. Going from there into Red Pass.

Q. Do you know whether they went through to the Gulf with oysters?

A. Yes, sir; I heard of them.

Q. I ask you of your own personal knowledge, if you know of any boat going clear through with oysters?

A. I never was on board and could not say.

Q. To what time do you refer, when you say boats went through; how many years ago?

A. That was before the dam was closed.

Q. I know it was before the dam was closed, but how many years before?

A. Something about three years ago, or a little over, since I saw them pass through there.

Q. Are there not other passes in that vicinity going into the Gulf?

Mr. Mellen objects to the question as irrelevant; the question involved here, is the one pass, the Red Pass; whether it is a navigable stream and whether it was dammed by these defendants without the knowledge of the Secretary of War.

The Court:

I will charge the jury on that point; but I do not see anything objectionable in the question.

Q. Does not Tiger Pass run from the Mississippi river into the Gulf?

A. It has not the depth; it does go to Southwest Pass.

Q. Is there not a pass called Tiger Pass?

A. Yes, sir; but that has not a navigable depth, because they have to go down four or five miles to get to the Gulf.

Mr. Leovy objects to the answer of the witness.

Q. There is a stream called Tiger Pass that leads from the Mississippi river into the Gulf? A. Yes, sir.

Q. Have you not seen luggers going through that stream?

A. I never seen any loaded luggers go.

Q. I do not ask you whether you ever saw them loaded go through, but whether you saw luggers going through from the Mississippi river, loaded, to the Gulf of Mexico?

A. No, sir; I saw boats going down to the willow camps, but not to the Bay.

By Mr. Mellen:

Q. What explanation do you desire to make about Tiger Pass?

A. That it has not got the depth for an outlet, because the water is too shallow for boats to go through; they have to go down the river and around Southwest Pass, which would make a difference to the luggers of from 40 to 50 miles, according to the scales of the coast chart.

Q. Since the damming of Red Pass? A. Yes, sir.
Q. Tiger Pass is not as deep as Red Pass?
A. Not at the outlet.
By Mr. Leovy:
Q. I understand you to say that you had never gone through Red Pass into the Gulf, yourself? A. No, sir.
Q. Have you ever gone through Tiger Pass into the Gulf?
A. No, sir.
Q. How do you then know the relative depths?
A. Observing from other men that had luggers down there running oyster boats, I know from them.
Q. Do you know yourself, of your own personal knowledge, about the relative depths of the Tiger and the Red Passes, except by hearsay, from others.
A. Well, I never had any business down there.
Q. All you know about the relative depths of the mouths of Tiger Pass and Red Pass are, is what you know from others?
A. And I saw some luggers going down the river, because they could not get through there.

JOHN COLLEN, sworn for the United States, says:

By Mr. Mellen:
Q. Where do you live? A. At Buras Settlement.
Q. That is down near the jetties, near the Jump?
A. Well, it is within the distance of 10 miles.
Q. How long have you lived there?
A. I was born there; 44 years I have been living there.
Q. What is your business?
A. I have been farming for a long time, and still am farming yet; I have three farms, and two or three years ago I started into the oyster business, running a boat, and this year I bought a boat of my own.
Q. What size boat did you have? A. A 35-barrel boat.
Q. What water did she draw? A. You mean how much water she drew?
Q. Yes? A. She drew about two feet and a half, loaded, or a little more than three feet, something like that.
Q. Do you know Mr. Augustus F. Leovy and R. S. Leovy?
A. Yes, sir; I know Mr. Leovy from a boy.
Q. Do you know anything of the damming of the Red Pass some time ago?

A. Well, I think it is going on three years, but any way two winters ago; this winter it will be three. Three winters ago I was running through this bayou and went out with a load, and was out two days and the following day, the third day, I came in. I bedded my oysters and came in, but I heard Mr. Leovy say he was going to close this bayou; and this trip when I came in I saw Mr. Leovy standing there with about 10, 12 or 15 men, I cannot say exactly how many men there were; some of them were overboard into the water, near up to the waist and others standing near to the bank, and I said to Mr. R. S. Leovy and a good many more men from the Jump, "I am just in time," and he said "Yes," and I said "God, are you going to shut this thing up?" And he said "Yes." I saw them driving the piles down there; they had all the posts on the bank, and the boards all sawed. I had got out the next time and coming back I went round the other way, because Mr. Leovy had that pass closed.

Q. Had you ever gone out at that pass before?

A. I did these two winters.

Q. Where did you get the oysters?

A. From the bank at quarantine across the river; I go through the Jump where Mr. Leovy closed, into the Mississippi river, I get into Cubitt's Gap from there and go round this side back of the quarantine to get the oysters; and when I came back I came through where Mr. Leovy closed.

Q. Through Cubitts Gap into the Mississippi river, and from there into the Pass?

A. Yes, sir; take that pass that Mr. Leovy closed up, and go into the East Bay with my oysters and came back for another load, as we do steamboating, for the two winters.

Q. That is just preceding the closing of the dam?

A. Just before the closing.

Q. What winter was that?

A. Two winters, and this winter is three that this pass is closed; three winters I have been carrying oysters through there.

Q. When you went through the last time were there any persons still driving?

A. No, sir; they were just starting to drive them; they were just lying across there, and piles of boards and piling lay alongside of the bank and the men overboard; they had some started from the edge of the bank, which came across, but on the right hand side, was where they commenced

driving them, but the line was going across; they had started from the lefthand side going towards the shore.

Q. Did you go all the way then through to the Gulf?

A. Yes, sir; all the way to the Gulf.

Q. When did you come back?

A. I came back the next day.

By the Court:

Q. What was the depth of water through that Red Pass?

A. In this pass?

Q. Yes.

A. In the pass there is about from 10 to 12 feet; of course, when it came straight, you found from five to six feet, but where the water would strike in the bend, like the Mississippi, there would be a deep channel, because it would dig out.

Q. What was the depth all the way through to the Gulf?

A. From 5 to 10 or 15 feet; that is all the way to the Gulf; but then there is a bar at the outer end of the pass; and of course when you come there, you only find 2½ or 3 feet; then if you stay there a couple of hours, the tide will rise and you can find from 3 to 4 feet of water.

Q. Do you know of anybody else that has been going through that stream with boats?

A. Yes, sir; Captain Mitchell has been going through a great deal more than I have.

Q. I mean of your own knowledge, do you know of others that have gone through there, engaged in commerce?

A. Yes sir, I saw others going through there, with luggers and boats there.

Q. What size luggers?

A. Luggers holding about 150, or 120 or 125 barrels.

Q. Barrels of oysters?

A. Yes sir, Captain Mitchell has a boat of that size, 120 barrels, city measure.

Cross-examined by Mr. Leovy:

Q. How long is Red Pass?

A. About 12 miles.

Q. 12 miles from the Mississippi river to the Gulf?

A. Yes sir, that is what I was told it was, and it seems that is it, because it is a very long pass.

Q. How many passes are there leading from the Jump?

A. Leading from the Jump now?

Q. Yes? A. Tiger Pass and Grand Pass.
Q. And Williams Pass?
A. I cannot say I never was down William Pass.
Q. You say it is 12 miles long?
A. Yes sir, from the mouth of the Mississippi river to the Gulf to Red Pass, 12 miles.
Q. Your purpose in taking oysters there was to bed them?
A. Yes sir, bed them and then take them to the city and sell them.
Q. Any oyster boats that go through this pass with loads of oysters to the city, will return by the way of Bocolo's canal?
A. Yes sir, the Company Canal; I have been carrying them the same distance this winter myself, 95 barrels, but at the time I am telling you, three years ago, when Mr. Leovy was closing the bayou, my boat is 95 barrel boat and this winter I run through Southwest Pass, and that is a great deal longer out to sea, and it is pretty dangerous. I used to come round at Livingston and Point a la Gard, and that is a very bad place, only about 2½ feet of water. We would pass through 25 or 30 boats there every day having a good channel and a good place to pass through; and at the Jump as at Point a la Gard, you pass 25 or 30 boats there every day.

By the Court:
Q. I understood you to say, that before the pass was closed, passing there was just as good as it is now at Pointe a la Garde?
A. Yes sir, that is what I mean, passing there before the pass was closed was as good as at Point a La Gard; and if you were aground on the bar, when the tide rises, you can get off as well as at Point a la Gard; there are 25 or 30 boats there all the time.

MARCO BENDITICH, sworn for the United States, says:

By Mr. Mellen:
Q. Where do you live? A. On Spain street. I live to-day.
Q. Where did you live formerly? A. On Spain street.
Q. What business are you in?
A. No business at all, now.

Q. What business were you formerly engaged in?
A. Well, I have two sons, one runs a cart and one has a coffee stand.

By the Court:
Q. What was your business before?
A. Well, that is another question, I used to run a lugger in the oyster business.

By Mr. Mellen:
Q. When did you run that?
A. I began to run that from 1859 until to-day.
Q. Until to-day? A. Yes sir, of course, only we did not run in the summer.
Q. You were in the oyster business?
A. I was in the oyster business always.
Q. Did you have occasion to go through Red Pass with any boat of yours?
A. Yes, sir.
Q. When did you last go through Red Pass?
A. I go the last time through Red Pass, seven years ago with a load of lumber; I went through Red Pass and Red Pass was blocked, and I went through Pass Toufine, and got to sea with the load of lumber.
Q. You go into Red Pass from the Jump?
A. Yes sir, from the mouth.
Q. And went down Red Pass? A. Yes, sir; and then Pass Toufine.
Q. You went through Red Pass and Pass Toufine to the sea; you say you did? A. Yes sir.
Q. How much would you be drawing? A. 8½ feet.
Q. Had you occasion to pass through with boats ever, from the Gulf to the river?
A. I went to go in from the outside and go out from the inside, that is the navigation since the Red Pass is closed up.
Q. When was it closed?
A. I cannot say I never took a book of that.
Q. You say you were engaged in the oyster business?
A. Yes, sir.
Q. Where did you get the oysters?
A. Sometimes here at the west at Timberline and at the quarantine station, sometimes down in the jetty, anywhere I could get oysters.
Q. What route would you take when you came from the

East Bay with your boat to get the West Bay, to the west of the river?

A. I used to go through Cubitts Gap, and come through the Jump and again into Pass Tonfine to get into Bayou Cook.

Q. You first went from the Jump into Red Pass, and then from Red Pass to Tonfine and then on to the Gulf?

A. Yes sir, that is the way I used to go.

Q. Up to what time do you say you went through Red Pass?

A. I did not pass through there since the last seven years.

Q. But up to that time, you did go through?

A. Not since the last seven years I never went through; Pass Tonfine used to be open more and it was closed up and then I went the other way.

Q. What size was your oyster boat?

A. Well, an oyster boat is about six tons and some 30 odd barrels too, but I never knew the measure.

Q. Six tons? A. Yes sir.

Q. Is that the boat you used to go through with?

A. Yes sir, and before I used to have the lugger Dexter, and there is boats now in navigation always, drawing four feet, loaded.

Q. Did you go through Red Pass with that?

A. I used to go through Red Pass with that too.

Cross-examined by Mr. Leovy:

Q. Did you ever go through these passes for the last seven years?

A. No sir, I never passed through after seven years.

Q. Did you ever go all the way through Red Pass?

A. Before they closed it up.

Q. And speaking of seven years ago, did you go through Red Pass?

A. No, sir; not in the last seven years I have not, no water in the Jump.

Q. You do not understand me, seven years ago, you went from the river to the Gulf? A. Yes, sir.

Q. Did you not go part of the way through Red Pass, and part of the way through Tonfine Pass?

A. Yes sir, I was going inside of Red Pass, when I was further down. When I used to find the mouth of the Tonfine Pass, I used to go in.

Q. Did you ever go through Red Pass to the Gulf?

A. I mean before it was closed up.
Q. Do you mean a few years ago?
A. No sir, the way it was closed up; we used to go through, there were logs in the middle, but we used to go always and goes to-day also.
Q. Seven years ago, could luggers go through Red Pass to the Gulf; had you not to branch off to take the Tonfine Pass?
A. Yes, sir! you had to take the Tonfine Pass.

MARCO N. BENDITICH, sworn for the United States, says:

By Mr. Mellen:
Q. Where do you live? A. I live on Rampart street.
Q. You live in this city? A. Yes sir.
Q. What is your occupation; what do you do?
A. I work in the oyster business.
Q. Do you own any oyster boats? A. Yes sir.
Q. Do you run them? A. Yes sir in the season but not in the summer.
Q. Where do you run them from?
A. From Bayou Cook to the Mississippi, through from Bayou Cook to Tonfine wherever there are oysters I go after them.
Q. Do you know anything about the damming of Red Pass, down in the Parish of Plaquemine? A. Yes sir.
Q. Do you know when it was dammed?
A. It was stopped up about three years ago, I think it was in 1894.
Q. You are not sure about the year?
A. No, sir; I am not sure; I think it was stopped about 1894.
It is admitted, that Red Pass was closed in October and November, 1895.
Q. Before that Red Pass was closed, did you ever go through it from the Mississippi river, or from the Jump to the Gulf?
A. Yes sir, I passed through there two months before it was closed up, with a load of lumber from Jordan river, Bay St. Louis.
Q. What route did you take, how did you get into the Mississippi river?
A. Through Red Pass, I went into the river, then went down the river three or four miles, to the new gulf, the new

quarantine, went into the new gap and went into the sea, on the other side of the river.

Q. That is when you were going from west to east?

A. Yes sir, from west to east.

Q. But coming from the east with your load of lumber, you came through Cubitts Gap into the Mississippi river?

A. Yes sir, and went into Red Pass into the Gulf of Mexico through Red Pass.

Q. When you say you went through Red Pass to the Gulf, do you mean to say you went through Red Pass, or took another bayou, after having gone a piece through the pass, down to the Gulf?

A. I went down through Red Pass a piece, three miles and then another pass called Tonfine, and then took another branch, that is the only way we used to use.

Q. What size boat was that? A. That was six tons, 44 bushel.

Q. How much was that boat drawing at the time?

A. Loaded you mean?

Q. How much water was she drawing when you went through there?

A. Three feet and a half.

Q. Where did you take the lumber?

A. In Bayou Cook; I bought them in Jordan river and brought them into Bayou Cook.

Q. When you returned, how did you come?

A. The same way, like I went into the Mississippi river, I came the same way, I took the same route.

By the Court.

Q. At that time, what was the average depth of water in Red Pass?

A. When I passed that time?

Q. Yes?

A. It was enough water for me to pass right through; I am 14 years in this country, and I always passed in that place, it was the only pass I used.

By Mr. Mellen:

Q. Since it was dammed up, what route have you taken?

A. We took the big pass, what you call the big pass.

Q. What would you call the big pass?

A. They call the big pass about 10 or 15 miles further; you have to take 10 or 15 miles further, and it is dangerous to go with a small lugger.

Q. You say you had been going through there for 10 years?

A. For more; 14 years I am in this country, going through there every year.

Q. With your different boats? A. No sir, the same boat.

Q. Did you ever see any other boats going through there?

A. Yes, sir.

Q. What size boats?

A. Well, small ones and big ones, boats like mine was, and smaller ones, all sizes.

Q. What kind of boats? A. Luggers.

Q. Tell us just where the dam was placed, in Red Pass?

A. Well, it was about a mile, or less or more below the river.

Q. How far from the Jump; how far from the mouth of Red Pass?

A. About ten miles.

Q. You do not understand my question; how far from the mouth of Red Pass was the dam placed, across Red Pass?

A. Do you mean from the sea, or from the river?

Q. I mean from the Jump?

A. From the Jump, I said it was 2 miles.

Q. Two miles from the Jump?

A. Yes sir, from the Mississippi down, inside the pass.

Q. How far as the other pass, Tonfine Pass from there?

A. From the place where that pass is closed?

Q. Yes?

A. It is about the same, three miles, more or less, I do not know, I never measured it.

Q. Then this dam that is built across Red Pass is between the Mississippi river and Tonfine Pass?

A. Yes sir, between the Mississippi river and Tonfine Pass.

Cross-examined by Mr. Leovy:

Q. Did you ever go through Red Pass to the Gulf?

A. No sir, I take part of it to Red Pass until you come to Pass Tonfine, but never through Red Pass.

Q. Did not boats go through Red Pass to the Gulf, 10 or 15 years ago?

A. Yes sir. Q. That pass was closed then, Tonfine Pass?

A. I do not know why it was closed up, but I think it was closed with logs.

Q. You think it was closed up with logs?

A. I do not know, I never went there.

Q. The boats did not go from the river to the Gulf all the way through Red Pass for a good many years?

A. Well, I do not know anybody that pass through Red Pass, I have not been in it for a long time?

Q. Over ten years? A. Yes sir.

Q. You said you went through the big pass, was not that the Grand Pass?

A. Yes sir, Grand Pass.

Q. Did you ever pass through Tiger Pass?

A. No sir, I never used any pass but Tonfine Pass.

Q. The only route passing through from the Mississippi river to the Gulf, are the two passes, Grand Pass and Tonfine Pass?

A. Yes, sir.

Q. Are they not about the same depth as Red Pass, or deeper?

A. Yes sir, about the same.

Q. Is not all this country there, merely sea marshes, or low country, from the Mississippi to the Gulf, except near the river, for seven or eight miles; it is not all marsh land where these streams go through?

A. Yes, sir.

Q. For seven or eight miles of marsh?

A. Yes, sir.

Q. After you get out of Tonfine Pass into the Bay, is not that much more shallow than Tonfine Pass; after you get over the bar, is not that shallow?

A. Well, it is three or three and a half feet, it was enough for me to pass through. When I came there I never stopped, that is the only pass I used before it was closed up.

Q. But you know that portion, after you get out of Tonfine Pass, which you say is about three feet and a half in depth?

A. Yes sir, three feet and a half, more or less, it depends upon the tide, I never stopped there, but passed through.

Q. Three years ago, did not two men have to help you to get off some low land there in the bay; help you to pull over?

A. Three years ago?

Q. Yes? A. No sir.

Q. Three or four years ago, did you not have great

difficulty in getting over that low land, after you crossed the bar to get into the open bay?

A. No sir, nobody ever helped me to pass through.

By Mr. Mellen:

Q. Were your boats able to go through Tiger Pass?

A. When? Now?

Q. Before Red Pass was dammed, or now?

A. Well, I never used Tiger Pass before the Red Pass was dammed; I never knew Tiger Pass before Red Pass was dammed up; the only place I used was Red Pass.

Q. You say you never used it before; have you used the Tiger Pass since?

A. After that was closed up, yes sir.

Q. After Red Pass was closed up?

A. Yes sir, but when the tide is low, we used the Grand Pass; if the tide is high, you can use the Tiger Pass.

Q. Is the Tiger Pass as deep as the Red Pass was?

A. No, sir, shallower.

Q. And the route is further?

A. It is about the same distance.

Q. How far below Red Pass is Tiger Pass?

A. It is about two miles between the two.

LUKE SCOVELL, sworn for the United States, says:

By Mr. Mellen:

Q. You live at Buras? A. Yes sir.

Q. That is down near the Jump and Red Pass?

A. Yes, sir.

Q. How long have you lived there?

A. Since 1866, I lived all the time there.

Q. What has been your occupation? A. Fishing.

Q. Do you know Red Pass?

A. Yes sir, I know one place where they call Red Pass, but where do you mean, which side?

Q. I mean Red Pass; a pass called Red Pass that runs from the Jump down to the West Bay? A. Yes sir.

Q. Do you know of the damming of that pass? A. Yes, sir.

Q. It was dammed in 1895, was it not? A. In 1895.

Q. Well, it was dammed some two or three years ago? A. Yes sir.

Q. Did you ever go through that pass? A. Yes sir, every year.

Q. With your boat? A. Yes sir.

Q. What size boat, what kind of a boat?
A. With the lugger St. Luke, 7 tons, 18-100.
Q. A little over 7 tons? A. Yes sir.
Q. You say you went through every year? A. Yes sir.
Q. Before the dam was put there? A. Yes sir.
Q. How long before the dam was put there, the last time that you went through there?
A. The last time was after the storm in 1893, I buy a load of lumber, and pass through there with the city committee.
Q. You brought the lumber from where?
A. From here, from the Picayune tier.
Q. You went down into the Jump and into Red Pass? A. Yes sir.
Q. Where did you take the lumber to?
A. We went outside with the sea, to Bayou Cook to help the people that had nothing.
Q. Just after that storm, that killed so many people down on the coast?
A. Yes, sir.
Q. How long have you been passing through Red Pass with your boat, for how many years? A. I passed every year.
Q. For how many years?
A. With this boat? I had others, but with this boat, 15 years.
Q. Fifteen years, every year? A. Yes sir.

MICHAEL FANITIVICH, sworn for the United States, says:
By Mr. Mellen:
Q. You live at Buras? A. Yes sir.
Q. What is your occupation? what do you do for a living?
A. The oyster business.
Q. Have you an oyster boat? A. Yes sir.
Q. Do you know Red Pass? A. Yes sir.
Q. The pass that is down there by the Jump? A. Yes sir.
Q. Did you ever go through that pass?
A. I have been going through every year, up to—
Q. You passed through that pass every year, up to when?

A. Up to the time it shut up.

Q. Up to the time it shut up? A. Yes sir, and before.

Q. How long since you have been going though it?

A. It is past three years, I did not pass through it since 1894.

Q. You never passed through it since 1894? A. No sir.

Q. What size boat did you pass through with?

A. Well, they called it a 125 barrel boat.

Q. About 125 barrel boat? A. Yes sir.

Q. How much water did she draw?

A. It drew four feet, the lugger Margary; I have done it to the time I lost my partner.

Q. Where would you bring your oysters from; how near east to Cubitts Gap?

A. Yes, sir; from quarantine.

Q. Then you went from the Mississippi river?

A. Coming up the Mississippi river and going into the Jump.

Q. And from there into Red Pass? A. Yes sir.

Q. You would go down Red Pass; would you go all the way to the Gulf from Red Pass, or some other place?

A. No sir, I would go through Red Pass by the branch at Tonfine Pass, a branch of Red Pass.

Q. How often did you pass through there?

A. Well, I have been at it and my family before that, and I used to go through it every winter.

Q. Did you pass through once every winter or more than once?

A. Well, sometimes five or six times and sometimes more, in the winter; and sometimes ten times; I would be going down the river sometimes and would pass through Red Pass, and at the branch of Tonfine, that you would take in going out to sea.

BOZZO BOGETTO, sworn for the United States, says:

By Mr. Mellen:

Q. What is your occupation? A. Navigation.

Q. In what line of navigation? A. Bayou Cook.

Q. Did you run on vessels? A. Luggers.

Q. In what business were you engaged? A. Oysters and lumber and what I needed.

Q. How long have you been in that business?

A. From 1881 to 1893, I have been in the oyster business.

Q. Do you know Red Pass down at the Jump? A. Yes sir

Q. The pass that was dammed in 1895; do you know a dam had been placed across it in 1895?

A. No sir, not 1895; I have been through the pass from 1881 to 1893, and after that I did not pass any more.

Q. What size boats did you pass through with in that pass from 1881 to 1893? A. Well, from 100 barrels to 110.

Q. How much water did she draw? A. Well, at least three feet, or three and a half feet, when loaded, three and a half feet.

Q. How often did you go through Red Pass in these years?

A. I passed through, when I needed it I passed through.

Q. You brought oysters, or lumber from the east?

A. Yes sir, and sometimes I went to Pass Christian, and took lumber and went through Cubitts Gap up the river; then go through the Jump into Red Pass, into Tonfine Pass to the sea.

Q. You said that you did that every year, from 1881?

A. Well, not every year, but every year I needed.

Q. From that time up to 1893?

A. Yes sir, after 1893, I never went through there.

Q. You never tried to go though since?

A. No sir, because somebody told me it was closed, and I went through the other big pass.

Q. What is that? A. They always call it the big pass.

Q. Explain where the big pass is?

A. It is the same as you come into the Jump, it is in the Jump.

Q. Is that a more circuitous route, or further around?

A. Yes sir, it is from 15 to 18 miles going around.

Q. From 15 to 18 miles? A. Yes sir, and it is dangerous to go into the sea, going around it, and it takes you a good while going around; that was a handy pass for us and more close and more safe.

Q. And when you went into the bay? A. There was a big open sea.

Q. There was no open sea, when you went through Red Pass?

A. Yes sir, open sea, after you came out from Red Pass and go into Tonfine Pass, you go into the sea; but now, these days you have to go around 15 miles; I never measured it, but I think it is that.

Q. You think it is 15 miles further? A. Yes sir.

By Mr. Leovy:

Q. Did you ever go through Tiger Pass?

A. Yes sir, sometimes when it is high water; I pass it only going west.

PETER STEVELOVICH, sworn for the United States, says:

By Mr. Mellen:

Q. You live in Plaquemine parish? A. I was in Red Pass.

Q. You live in Plauemine parish? A. Yes sir.

Q. Down near Red Pass?

A. No sir, I live in Bayou Cook now; I was then before and used to work around and I quit and sold, when I was living in Grand Lake and then I came to Bayou Cook four years ago.

Q. What is your business? A. Oysters.

Q. Running an oyster boat? A. Yes sir.

Q. Did you ever go through Red Pass? A. Yes sir.

Q. With what sort of a boat? A. Well, I was on big and small.

Q. How big a boat?

A. The big one was drawing four feet, and the balance three feet and a half to three feet; I was on plenty of times, but never with them deep loaded; when I got to the pass, I never got back; the pass was good for the lugger.

Q. You say it was good for luggers? A. Yes sir.

Q. And your lugger drew four feet?

A. Yes sir, I did pass with the lugger, the big lugger St. Louis and then the America B, and two others.

Q. At what time did you pass through there the last time?

A. The last time I passed through there with the lugger Alain, drawing three feet five inches.

Q. When was that, how long before the damming?

A. The last time was four years ago, 1894.

Q. Do you know when the pass was dammed? A. Yes sir.

Q. For how many years had you been going through the pass?

A. About 12 years agoing.

Q. 12 years ago you started?

A. The place where it was closed; 12 years ago I was in Spanish Pass and after they shut that up it was Red Pass, and right through, in the middle is a log in a half reach, and then I took the Tonfine Pass from Red Pass to go into the sea.

Q. Do you know of anybody else who used Red Pass, who went through Red Pass on boats?

A. Anybody else?

Q. Yes, did anybody else go through there? A. Yes sir, certainly.

Q. That pass was used usually by men in the oyster business up to the time this pass was closed? A. Well, now so.

Q. I do not ask you about now, but up to 1895, what pass was used by most of the oyster men in going from the Mississippi river over into West Bay—what pass was used?

A. I do not know; I did not use the pass over there, because I did not need that pass.

Q. You say you did not use any pass; did you not go through Red Pass?

A. Yes, sir; in the summer time, but in the winter time I came from Bayou Cook to Socola's canal; I did not need to go through there with oysters. In the summer time when I am going to Biloxi for lumber or wood that they would use on Bayou Cook—

Q. What I ask you is, how did most of the people come with oyster boats, coming through Cubitt's Gap, and going through to West Bay; through what pass did all of these luggers go?

A. In Tonfine Pass; in Red Pass and then Tonfine Pass.

Q. All the luggers coming from Cubitt's Gap, going into the West Bay, would go into the Jump and then into Red Pass and Tonfine Pass?

A. Yes, sir.

Cross-examined by Mr. Leovy:

Q. Did not they go through Tiger Pass sometimes?

A. Yes, sir; I would take sometimes, Tiger Pass.

Q. Did you not go through Tiger Pass sometimes?

A. Yes, sir.

Q. Did you not go through the main, or Grand Pass and the big pass sometimes, also? A. Yes, sir.

Q. How many years is it since you have been going through Spanish Pass?

A. I do not know.

Q. Did you not go through Spanish Pass? A. Yes, sir.

Q. That pass is closed now? A. Yes, sir.

Q. Who closed it? A. I do not know, it is closed at the mouth.

Q. Somebody closed it at the mouth? A. Yes, sir; making a levee.

Q. You cannot go through Spanish Pass now?

A. No, sir.

Q. It is closed? A. Yes, sir.

STEFFANO RUSICH, sworn for the United States, says:

By Mr. Mellen:

Q. Where do you live? A. At Bayou Cook.

Q. Are you acquainted with Red Pass in Plaquemine parish, down at the Jump?

A. Yes, sir.

Q. What has been your business? A. I was running oysters there.

Q. You were in the oyster business, running an oyster boat?

A. Yes, sir; an oyster boat.

Q. Did you ever pass through Red Pass with your boat?

A. Red Pass and Tonfine Pass.

Q. When was the last time you passed through there?

A. I cannot say exactly; I do not know exactly the time.

Q. But as near as you can state?

A. Since it was closed I cannot pass any more.

Q. How long before it was closed up, did you pass through?

A. I passed by five or six years ago.

Q. Five or six years ago, or five or six years before it was closed up?

A. Well, I cannot say what time it was, but before it was blocked up, I passed through there.

Q. How long before that was it that you passed through there the last time? A. Well, about the month, or two months before.

Q. How often did you pass through there for many years?

A. Well, it is about—when I passed the first time?

By the Court:

Q. During how many years had you passed through there?

A. Since I came to this country; it is about 17 years.

Q. Did you pass there all that time?

A. No, sir; not all the time; when I had business to pass through there I passed through.

Q. I mean during all of that time? A. Yes, sir.

By Mr. Mellen:

Q. You say during 10 years, you passed through there from time to time?

A. I cannot say how many times I passed.

Q. I do not want to know exactly how many times you passed, but how long had you been going through that pass?

A. I told you about 16 years.

Q. What was the size of the boats you went through with?

A. I had plenty sized boat, I had small ones and big ones and skiffs; the biggest one was about 120 barrels of oysters; that was the biggest I was running.

Q. What was her draught? A. About 3 or 3½ feet.

Q. Are you still in the same business? A. Yes, sir.

Q. What route have you been taking since the damming of Red Pass, with your boat?

By the Court:

Q. What way do you go now?

A. Well, Tiger Pass and Grand Pass.

By Mr. Mellen:

Q. Is Tiger Pass as good as Red Pass was?

A. Yes, sir; it is as good.

Q. Is it as deep?

A. No, sir; you can pass through with a load any time now.

Q. Is Tiger Pass any further around? Is it further around by Tiger Pass than it was by Red Pass? Is the distance any longer?

A. Yes, sir; it is just as long as Red Pass.

Q. Is it longer?

A. It is about the same; by going through Tiger Pass, it is going through the sea; it is more for us.

Q. Is it further out on the sea? A. Yes, sir.

Q. Which was the best route, Red Pass or Tiger Pass; the best and safest?

A. Well, it is about the same.

Cross-examined by Mr. Leovy:

Q. Did you not sometimes pass through Tiger Pass?

A. Yes, sir.

Q. And the main pass or the big pass; did you not pass through these passes to go to the Gulf, the main pass and Tiger Pass, before Red Pass was closed?

A. No, sir; we did not use it before, I did not.

Q. Did not other oyster boats use it; did they not go through that way?

A. Well, I cannot tell you that.

Mr. Mellen on behalf of the United States, offers in evidence the letter of the Secretary of War, dated May 11th, 1898, addressed to Mr. J. Ward Gurley, United States Attorney, Eastern District of Louisiana.

And the Government rests its case.

Mr. Leovy for the defendants offers in evidence a certain map issued by the General Land Office at Washington, being the map of that portion of the country, duly certified as the State of Louisiana.

Mr. Mellen for the United States objects to the map as inadmissible. It is certified as a true copy, compiled for the purpose of showing the area of unsurveyed land; he objects to any evidence in this with respect to unsurveyed lands; or to show what kind of land it is as certified. The question before the Court is whether Red Pass was navigable, and whether it was closed by the defendants without the authority of the Secretary of War.

And pending the ruling of his Honor, the Court adjourned.

New Orleans, La., June 2nd, 1898.

The Court met this day pursuant to adjournment; present his Honor, Charles Parlange, Judge, with a jury.

Mr. Leovy:—Now withdraws the offer of the map, made yesterday, he stating that he has others which will serve the purpose better.

Mr. Leovy offers in evidence, the general chart of the coast, showing the approaches to the Mississippi river, Mobile Bay, and the Atchafalaya Bay; also showing the soundings of the passes.

He also offers in evidence a map of the same character, except that it is larger and shows more distinctly, the

passes, being marked Coast Chart No. 194 of the Mississippi river, from the Passes to Grand Prairie.

Mr. Leovy:—Although Pass Tonfine is now shown on this chart, we admit, that it is a shallow stream that extends to the Bay.

The Court:—There has been testimony here to the effect that people go through Pass Tonfine to the waters of the Gulf.

Mr. Leovy:—Yes, but no testimony showing that they went all the way through Red Pass to the Gulf.

SIDNEY F. LEWIS, sworn for the defendant, says:

By Mr. Leovy:

Q. Where do you reside? A. In New Orleans.

Q. What is your business?

A. I am a civil engineer by profession.

Q. What is your office?

A. I am now engaged as State Engineer; since 1880, for 18 years, and have been connected with the State Engineers' Department since 1877, 21 years. I have been State Engineer for 18 years.

Q. What are your duties as State Engineer?

A. To locate all public works, principally levees; that is what the State is now engaged in; but that does not prevent the State Engineers from other works; whatever we are called upon to do, by the State.

Q. Have you any duties to perform with reference to crevasses on the river? A. The duties we have to do with them is to close them after the water has ceased. I have been engaged in closing crevasses when the river was high, and when the water was running through, but I do not know that it is really one of our duties; our duties really are to stop crevasses after the water goes down.

Q. In building levees, if you come to places where there have been crevasses, what do you do?

A. We just build an earth embankment across it.

Q. You fill the space in and make the levee? A. Yes, sir.

Q. Are you familiar with this part of the country down at what is known as the Jump? A. Yes, sir.

Q. How far is that from the mouth of the river?

A. From the head of the Passes, it is about 15 miles from the mouth of the river to the Jump.

Q. From the head of the Passes?

A. Well, it is about 15 miles.

By the Court:

Q. You mean Red Pass is 15 miles?

A. Well, the Jump is the Main Pass; the Spanish Pass and the Red Pass are two little passes that deviate about a mile from the main waters of the Mississippi river.

Q. How far from the Mississippi river proper is this dam that figures in this case?

A. I think it is between half a mile and a mile, I cannot say exactly; the levee line goes down the Jump some distance, and then this Spanish Pass that I know of; that is the only one that the State closed in 1888; the State and the Third Levee District Board.

Q. We are speaking of Red Pass. A. That is just adjoining it.

By Mr. Leovy:

Q. Is not Spanish Pass one of these going into the Jump, that you closed?

A. Yes, sir.

Q. Is not Red Pass similar to the Spanish Pass?

A. Well, the Red Pass and the Spanish Pass meet almost together in the Jump.

By the Court:

Q. You say it is a mile, or a mile and a half from the Mississippi river to the place where this dam is? A. Yes, sir.

Q. Now, from this dam to the beginning of Tonfine Pass, how far is that?

A. Tonfine Pass? I would have to look at the map.

Q. Certainly.

A. (Referring to the map) Here is Spanish Pass, which I show you, and here is the Jump, which is about 85 miles from the city. The levee line extended in 1888—we built—that is, what is called the Third District and the State built all this line of levee from Fort Jackson down to the Spanish Pass, and dammed that up about a half mile below the head waters of the Jump. The Spanish Pass runs in this direction, and Red Pass, while they meet right near one another, deviate, and the Red Pass goes south and Spanish Pass in a more northerly direction. The object of closing Spanish Pass was to bank up all the waters here to make the lands available behind.

Q. Now, from the dam to the beginning of the Tonfine Pass, what is the distance?

A. I do not know, I never went down this Tonfine Pass,

and I do not really know about it. Where is Tonfine Pass?

By Mr. Leovy:

Q. There it is on this map.

A. Well, that is not over a mile and a half.

Q. You mean a mile and a half to where the Tonfine Pass branches?

A. Yes, sir.

Q. How far is Tonfine Pass from the mouth of Red Pass?

A. It is not quite half a mile.

Q. How many passes are there, branching off from the Jump, going into the Gulf?

A. Well, the only thing I would have to go by are the maps; I never have been down this pass, any further than right here at my work; I never had occasion to go down here through this pass on this side of the river through Cubitts.

Q. You have the map before you, state?

A. This is a correct map.

Q. How many passes are there according to this map?

A. There is the Jump, proper; there is Spanish Pass, Tiger Pass and Red Pass, Williams Pass and Grand Pass, which is probably the main Jump.

Q. Is Grand Pass the largest and deepest?

A. Yes, sir; the largest and deepest on this map.

Q. I want to ask you from your knowledge and experience as an expert, is the Jump a natural stream, or a crevasse from the river?

A. It is a crevasse like Cubitt's Gap, or the Baptiste Canal on the other side; they are all breaks through the bank.

Q. Is it unlike other crevasses that you have closed on the Mississippi river?

A. Well, it is a crevasse, and because it is away down near the mouth of the river, that is the reason it has never been closed.

By the Court:

Q. What do you mean by saying that it is a crevasse; do you mean to say the water has forced its way through the bank?

A. Yes, sir.

Q. Was there ever any levee there that was broken through?

A. Well, if there was, it was a private levee, not of the public system.

By Mr. Leovy:

Q. You know as well as I do and better, what we usually call a crevasse in Louisiana is, the filling of a levee or artificial bank, and letting in the water through that. In that sense, was the Jump ever such a crevasse as that?

A. The Jump was a break through the natural bank.

Q. And not through an artificial bank?

A. No, sir; but that is what we call a crevasse; for instance, I will give you an illustration. Pass a l'Outre is a crevasse; there is no levee there, but that is a crevasse.

Q. That is what I want to know, if you mean a crevasse in that sense, the breaking through of the water?

A. Not only by the water going down the main river; but any break in an engineering term, would be a crevasse; if there is any departure from the natural channel of the stream; for instance you have a crevasse at Pass a l'Outre, and Cubitt's Gap is called a crevasse.

Q. Have you known of any artificial levees being below the Jump, or where the Jump is now?

A. No, sir; from Fort Jackson to the Jump was built by the State in 1888, 10 years ago. Now the levee system on that side of the river only goes as far as the Jump from Spanish Pass.

By the Court:

Q. The levee does not go so far as this dam?

A. That dam was built by the Police Jury, I believe; it was not built by the State. Spanish Pass levee was built by the State in conjunction with the Third Levee District Board. The only reason for them building the Red Bayou (Pass) was, that they did not think the water affected it. The people petitioned the Third District Levee Board that the high water backing up in the Spanish Pass and going in a northeasterly direction, interfered with the lands, and if they got that dammed, it would be all right; they never mentioned Red Pass at that time.

By Mr. Leovy:

Q. About a year ago when the river was so high, if there was no dam there, would not the same thing have taken place, the overflowing of the country?

Mr. Mellen objects, as irrelevant, and having nothing whatever to do with the case.

The Court:—Your objection goes more to the effect than to the admissibility; I will let it in.

By Mr. Leovy:

Q. Was not the Mississippi river a year ago unusually high?

A. Higher then (than) ever it was before, down in that section.

Q. If Red Pass had not been dammed, what would have been the effect of that excessive high river?

A. I cannot say exactly, what it would be, but it would have gone over the bank; the higher the river was, the more it would have interfered with the drainage of the country; but that is a sort of general question that I cannot answer positively.

Q. You know all about the country above the Jump, Buras Settlement and that region?

A. Yes, sir; that country is now in the Buras Levee District; it was formerly in the Third Levee District, which District has been divided into two districts, now called the Lafourche District.

Q. From Buras down to the Jump, what is the character of the country along the Mississippi river?

A. Well, I judge for about six acres inward, on an average it is a fine country of orchards, the finest in the State.

Q. That goes down to the Jump?

A. Right down to the Jump.

Q. What would be the consequence of the overflowing of Red Pass as to that whole country, for 20 miles above it?

A. I cannot say for such a distance.

Q. Well, say 10 miles?

A. I cannot say; from Fort Jackson down, it would be to the interest of the people who have property in that neighborhood to have the Red Pass and all the outlets down there, closed; that is what they need for proper drainage.

Q. But the advantage of closing Red Pass is not only to prevent the overflow of the high river, but it would drain the country all around?

A. Yes, sir.

Q. Do you know anything about the passage of a resolution by the Police Jury to close that pass?

A. No, sir; I do not know anything about it.

Q. You have never been through this pass to any extent, yourself?

A. Simply, that I made a survey of Spanish Pass in 1888, I would have made a survey of Red Pass and closed it, if their petition called for it, but they were perfectly satisfied with the closing of the Spanish Pass at that time;

they were glad to get that done; they never saw any levees built down in that section previous to that time.

Q. Do you know anything about the value of these lands about the Jump, in front of the Mississippi river, for six or eight arpents back?

Mr. Mellen for the Government renews his objection of irrelevancy.

Mr. Leovy:—The Police Jury of this parish is vested with the power to order such a work done, its power not only relates to the health of the people but to other matters.

The Court:—Here is a plain Federal Statute, which says that notwithstanding any authority from the Legislature, which is a higher authority than a Police Jury, no dam shall be put across any navigable stream of the United States, without the authority of the Secretary of War, and it seems it can make no difference what the result of the damming was, whether it was a benefit or not. However, I will overrule the objection, but this objection and this ruling shall apply to all similar testimony offered by the defendants, as the case progresses.

By Mr. Leovy:

Q. The question is, are not these lands valuable? I ask you again, what is the value of the lands just above the Jump for several miles, not fronting on the river; I do not mean in dollars and cents, but are they valuable?

A. They are valuable principally for orange and fruit culture, especially orange culture.

Q. Are they not cultivated as orange orchards?

A. They are; some orange orchards, I do not know how many of them, but there are many valuable orange orchards below Fort Jackson since the building of the levee in 1888, and previous to that, there was nothing there but a palmetto swamp, and grazing lands.

A. It is the same in these overflows from Buras down to and below Fort Jackson.

Q. How many miles is that?

A. From Buras to Fort Jackson is five miles, and then there are three miles of very fine orchards below; there would have been a great deal more if there was better drainage.

Q. Have you been down to the Jump recently?

A. Not recently, but inside of five or six months.

Q. I ask you the question with reference to the orchards immediately on the Jump and fronting the Mississippi river?

A. I do not know exactly about the Jump proper; you ask me if I was down at the Jump; I have not been at the Jump proper, but right at Fort Jackson. I was there about a month or so ago.

Cross-examination.

By Mr. Mellen:

Q. Whose orchards are those?

A. I believe Dr. McCaleb is the first orchard; Mr. Fastling, and also Mr. Schomber has one or two orchards.

Q. Has Mr. Leovy, who has just been questioning you, any orchards?

A. I do not know.

Q. Have the defendants any of them?

A. I do not know who the defendants are; they asked me as to the neighborhood, and down at the Jump proper; I do not know who owns that property; in fact, I do not know who owns any of the property.

Q. Do you know when the Jump first began?

A. I cannot say exactly; there is history about that; I think you can find something in history as to its being a canal or ditch; then it became Gilbert's Canal.

Q. Do you not know it started over 60 years ago?

A. Yes, sir.

Q. There has been a navigable stream then from the river, at the Jump?

A. Yes, sir. I cannot say whether it started 60 years ago, but I question very much to-day, whether it is a navigable stream.

Q. There is a pass?

A. Yes, sir; right in there. There is a history of all the breaks in the Mississippi river Jump, as well as Cubitt's Gap, the Baptiste Canal, which were only navigable at high water, so at the mouth, they are divided up into little streams, or narrow passes.

Q. Then of your own personal knowledge, you knew nothing of the navigability of Red Pass?

A. I said I had not been down Red Pass, except at the head.

Q. Then your testimony in regard to the depth of these waters is based upon theory?

A. Yes, sir; upon theory.

Q. Do you not know, in the beginning, 60 years ago, Red Pass went through the Jump?

A. I do not know, it may be possible.

Q. How long have you been familiar with that country down there?

A. I have been familiar with that country since 1878, 20 years.

Q. Do you not know that at that time the Jump was navigable?

A. No, sir; I do not.

Q. Do you know that it was not?

A. No, sir.

Q. Did you not see the boats there?

A. No, sir; I did not see any boats going down the Jump in 1878.

Q. What do you call boats?

A. When you say navigable, you mean large steamers, you do not mean small craft.

Q. No? What do you mean, luggers?

A. Yes, I know no steamboats can go through there.

A. What I understand by a navigable stream, is, navigable for steamers that draw a certain depth of water, and not luggers; if you mean small craft? I suppose it is navigable to-day, and so is Red Pass.

Q. For craft drawing two or three feet of water?

A. Yes, sir; I suppose so.

Q. You understand a navigable water to be one that will float a boat drawing 10 or 15 feet?

A. Well, it certainly calls for commerce; take the draught of a vessel, 10, 12 or 20 feet of water. We have an idea of Southwest Pass with its 14 feet of water, and still do not use that, but South Pass, because it has—

Q. You do not consider Southwest Pass navigable?

A. Yes, sir; for vessels drawing 10 or 12 feet of water.

Q. Do you know how much water there is at the mouth of the Jump?

A. I have no idea what it is to-day, but if these charts are correct, and I believe they are very accurate, because the Mississippi River Commission has made recent soundings, but I do not think its charts are out yet; but you can get that information from the Mississippi River Commission having a chart made from Cairo to the head of the passes; and Major Quinn can give you the depth down there; there has been a recent survey made there.

By Mr. Gurley:

In order that there may be no misunderstanding of this question, I would like to ask you for some information: You speak of this Red Pass as being a crevasse; then you would call Grant Pass a crevasse also?

Q. What would you call the Southwest Pass?
A. That is a mouth of the river.
Q. What would you call North Pass?
A. That is one of the mouths of the river.
Q. What would you call South Pass?
A. That is one of the mouths of the river.
Q. What would you call Southeast Pass?
A. What would you call Southeast Pass and Northeast Pass? The principal passes of the river, are North Pass; or Northeast Pass, South Pass and Southwest Pass. Now, these other passes there are branches which are made by the water breaking through the banks and they have been navigable for a time after, but the (they) eventually silt up. That has been the history of the whole river. You may ask me what is Pass a l'Outre; that has been recently made, but I call it a crevasse. The only general explanation which I can give you which covers the whole point, if you confine yourself to them is, that all these breaks, the Jump, Baptiste Canal, and Cubitt's Gap and breaks in the passes themselves, are, in an engineering sense, considered crevasses. Engineers differ. Some think they ought to be closed, and some think not; there is a great difference of opinion, as there is in your profession; but the history of them is this; so far as my knowledge goes, that while they may maintain their depth at the head, where the break took place, at the mouth they will silt up, and by silting up, force the water through other little channels, just open like the fingers of your hand, and these channels may make them in a few years.

Q. So it is the Mississippi river at its mouth that is filling up?

A. Yes, sir; to a certain extent it is.

Q. Then you call anything a crevasse, when there is a change in the bed of the river, or stream?

A. A change from the main channel.

Q. Then you call what took place a few years ago at Vicksburg, a crevasse?

A. Well, that is a break in the levee.

Q. Did not the river change its course there?

A. No, sir; it did not change its course, that is going a little too far; it may have been detrimental to the river bed, but not to change its course.

By the Court:

Q. What assures you that this Jump, open for 60 years, is a crevasse; why do you say so?

A. Because that is not a natural outlet of the river; it is artificial.

By Mr. Gurley:

Q. You mean to say it is not the original channel?

A. No, sir; it is not.

Q. That is what you mean, it did not make itself, any more then the river?

A. Somebody helped to make it.

Q. What about Cubitt's Gap?

A. Somebody helped to make that; there was a ditch there cut through by some one.

Q. Why do you call the various branches below, mouths; why do you call all of them mouths there, any more than if they occur a little higher up, and then go into the sea, or Gulf?

A. I can only answer the first part of your question by saying, that you find them on the map—the head of the passes—you find them called by different names, North Pass, Southwest Pass, South Pass and Pass a l'Outre.

By the Court:

Q. You find upon the map Red Pass; you say that is a pass?

A. That is a pass from the Jump; the Jump was never put down on the map as a channel.

Q. But you have Grand Pass, that is put down?

A. Well, you may as well say, Cubitt's Gap, is a channel of the Mississippi river.

Q. There are different ways to the Bay and Gulf, to what extent have they held the depth of water?

A. They held the depth of water when they first took place, and after a time they silt up, as they do the same to-day; I cannot say to-day if you could go through Cubitt's Gap, except in a skiff.

By Mr. Gurley:

Q. How long has Red Pass existed?

A. I cannot say, as long as the Jump itself, I presume.

Q. You spoke of the damming of Red Pass being beneficial to the lands there, on account that it prevents overflows. The question was objected to by the Government, and the objection overruled, but a few questions will be asked you about that. A system of levee along Red Pass would have answered the same purpose, would it not?

A. No, sir.

Q. It would not? You could not have leveed the water out, just to prevent overflowing?

A. I suppose you could levee it out all around.

Q. Exactly so, but it would have cost the lands benefited, very much more? A. Yes, sir.

Q. Then this was a short and cheap way to prevent the overflow of some particular lands?

A. Yes, sir.

Q. By the closing of that Red Pass, and stopping passage through it?

A. Well, let me qualify my answer. Of course, if the State Engineers were required to give their advice, on what should be done, as we are consulting engineers of the Levee Board and we should not have recommended the leveeing of these banks, but the closing of them.

Q. You thought it was the cheapest way?

A. Yes, sir; the cheapest way.

Q. You are considering the lands, only?

A. That is all.

Q. You are not considering navigation at all?

A. Well, that is all.

Q. In other words, you would have dammed up the pass instead of leveeing its banks?

A. I think we would. Further, I think we would have a perfect right to dam up the Jump, if the Levee Boards told us to.

Q. You consider you have a perfect right to dam up Cubitt's Gap?

A. Yes, sir; if it is in the levee district.

Q. In other words, you consider you have a perfect right to dam up any stream?

A. No, sir; not any streams, but these streams.

Q. Any of these streams which you consider within your district?

A. Yes, sir; within our district; we would not dam up the Bayou Lafourche although we recommended it; and we were getting up a petition around there, signed by the riparian owners to get Congress to dam up that stream to prevent the State having the expense of doing it. But while we would not dam that, we would dam Red Pass.

Q. Why do you make that distinction?

A. Because Red Pass is only a crevasse in the river bank, and we can close up any crevasse; it is not considered a navigable stream.

Q. What do you consider a navigable stream?

A. I consider a stream like the Bayou Lafourche and the Lake and the Atchafalaya river.

By the Court:

Q. How deep must the stream be to meet your views of navigability?

A. Red Bayou (pass) has no more than three or four feet of water, and it interferes with the drainage of the country.

Q. That is not the question; how deep must the bayou be to be deemed navigable, according to your views?

A. As I stated, we do not consider—as an engineer, I do not consider the Jump a navigable stream, or any of its passes.

Q. I am sorry you do not give me the information.

A. I cannot give it to you; if you ask me how deep a stream has to be to be navigable, I say it depends upon the amount of rainfall; perhaps some streams have to be made navigable by engineering appliances. For instance South Pass had only seven or eight feet of water when it was made navigable by the jetties.

Q. When a man says he believes one stream to be navigable, it is reasonable to suppose that he has some rule by which to decide, which is not navigable and which is navigable; what the Court wanted to get at is, as to when you consider a stream navigable, or not?

A. I can only answer that question, because it refers to the Jump; I can only refer to that by stating, that neither the Jump, or Cubitt's Gap, or the Baptiste Canal, are anything but breaks in the levee bank; whether they were made by artificial means, or otherwise, they are crevasses and are not considered by me or any of my confreres, as navigable streams, from the Mississippi river.

By Mr. Gurley:

Q. That is the only answer you can give to the Judge's question?

A. Yes, sir.

Q. You have no standard by which you can judge a navigable stream from one that is not navigable?

A. I cannot understand what you mean.

By Mr. Leovy:

Q. You were asked with reference to what occurred 50 or 60 years ago; how old are you?

A. I am 45 next birthday.

Q. You have been an engineer since when?

A. Since 1874, 24 years.

Q. Do you know anything at all, as to the condition of the river down at the Jump before 1874?

A. No, sir.

JOHN C. DeARMAS, sworn for the defendant, says:

By Mr. Leovy:

Q. Where do you live? A. At Buras Settlement.

Q. What is your business?

A. I am levee inspector for the Levee Board.

Q. For what board? A. For the Buras Levee District.

Q. How long have you lived down at Buras?

A. I was born and raised there, 44 years ago.

Q. What are your duties as levee inspector?

A. To keep them in repair; to keep them clear, and report their condition to the Levee Board when it meets once a month; I have charge of the full line of levees.

Q. Do you know anything about the country in the neighborhood of the Jump?

A. Yes, sir.

Q. The Jump is about 12 miles from the head of the passes?

A. Between 12 and 15 miles, I should judge.

Q. Have you had occasion to go through Red Pass and the other passes in your lifetime down there?

A. I did go into Red Pass twice to my knowledge.

Q. When were these two times?

A. The first time must be, at least 8 or 9 years ago, I could not give you the exact date.

Q. And the second time?

A. The second time was in the latter part of December, 1894, I went there with a party on a hunt.

Q. Was Red Pass closed the last time you went through in 1894?

A. No, sir.

Q. So you went there before the dam was put up?

A. Yes, sir; you asked me if I went through Red Pass.

Q. Yes? A. No, sir; not the whole way, no sir.

Q. Did you go either time through Red Pass, the whole way to the Gulf?

A. No, sir.

Q. Could you go through either time?

A. No, sir; the first time I went there, I inquired and found it was dammed by logs at the lower end.

Q. That was the first time? A. Yes, sir.

Q. And also the second time? A. Yes, sir.

Q. Have you known anybody to pass from Red Pass to

the Gulf, when they got some distance down where it branches off to Tonfine Pass?

A. Yes, sir; Tonfine Pass.

Q. What size boat were you on the first time?

A. The first time was a small flat boat, about 25 feet long and 8 feet wide.

Q. Drawing how much water? A. About a foot or 18 inches.

Q. Was it empty? A. No, sir; we had our hunting traps in it.

Q. Did you have any freight? A. No, sir.

Q. Did you go hunting? A. Yes, sir.

Q. Did you return by Tonfine Pass?

A. No, sir; not that first time, I went out through Toleffero's canal; I went out the back way.

Q. You went to Tonfine Pass? A. Yes, sir.

Q. What was the condition of the pass at that time?

A. We found for inches of water; the tide was low, and we had to wait four hours before we got through.

Q. How long were the Tonfine and Red Passes together; what was the full length from the river to the Gulf?

A. I measured it by the United States chart I carry on my boat, and found it 12 miles long to the sea.

Q. How much did you say was Red Pass? A. A little over one-third.

Q. About four miles? A. Pretty near that, four or five miles.

Q. Did you have any difficulty in getting through Red Pass, before you got to the Bay? A. No, sir.

Q. When you got there, what took place? A. At the Bay?

Q. Yes, when you got to the mouth of the pass, and attempted to get into the Gulf?

A. When we went first there, we found the tide was too low to get out; we hunted around, and when the tide rose, we went out; it was risen about a foot and we went out.

By the Court:

Q. Do you say you had no trouble in going through Tonfine Pass?

A. No, sir; at the lower end.

Q. The trouble arose when you got out to the Gulf and you had to wait there? A. Yes, sir.

Q. But going through Tonfine Pass, you had no trouble? A. No, sir; none whatever.

By Mr. Leovy:

Q. I do not think from your Honor's question, that he understands; now my question is, when you got to the end of Tonfine Pass, you got to the Bay? A. Yes, sir; or the Gulf of Mexico.

Q. What is the character of the land and water, when you got to the mouth of the Tonfine Pass, until you got to the Gulf?

A. When you get to the outskirts of navigation, you find very little difference there, between the portion of the land on both sides where the grass grows, and the opening of the Pass; if it were not for the grass growing on both sides, one could go as well over the portion where the grass grows, as where it does not if the tide is low.

Q. When you get to this flat bay, there is no channel?

A. I never found any there.

Q. How much water did you find there before you got to the open water of the Gulf?

A. On that chart, when we found the tide high, it was a foot or 15 inches.

Q. Did you have any difficulty in going over? A. No, sir.

Q. How much were you drawing? A. 12 or 15 inches.

Q. But you had to wait for high tide to get that?

A. Yes, sir.

Q. How deep was it when it was high tide?

A. It depended upon the strength of the wind; it gets over the grass; in that portion of the neighborhood, it is over the grass, three feet further down in the entire channel.

Q. But I mean at the mouth of Tonfine Pass?

A. It is the same thing; in a heavy south wind, or southeast wind, it backs up the tide.

Q. That is from one to three feet? A. Yes, sir.

By the Court:

Q. All that refers to the condition of affairs, after you got out on the Gulf from Tonfine Pass?

A. Yes, sir; at the sea marsh.

Q. But while going through Tonfine Pass you have no difficulty?

A. No, sir.

By Mr. Leovy:

A. Yes, sir; at the sea marsh.

Q. But while going through Tonfine Pass you have no difficulty?

A. No, sir.

By Mr. Leovy:

Q. Now here is this dotted place, after you get through Tonfine Pass, on this map does that represent the lands, and this is the Pass?

A. Yes, sir.

Q. You have to come how far before getting into the open Gulf?

A. You have the measurements there; I carry one of these in my own boat, and I always refer to it; that sounding on the top, when you find low tide, you find no water.

Q. At the mouth of Tonfine Pass, before you get into the Gulf proper, you find through the marshes, one or two feet deep of water, as shown on this map?

A. Yes, sir; outside of the land at the mouth of Tonfine Pass.

Q. So that if a boat leaves the Mississippi river and attempts to go into the Gulf, across the lake or anywhere else, if she draws three feet of water, can she get out into the Gulf?

A. Unless the tide is very high, and the wind blows south-southeast, or southeast.

Q. But the average tide? A. It is about a foot.

Q. Have you ever known it to be over three feet?

A. Not to my knowledge.

Q. Do you know anything of Tiger Pass. A. Yes, sir.

Q. Have you ever been through it? A. Yes, sir; several times.

Q. Is it as deep as Red Pass? A. It is much deeper.

Q. Have you ever been through Main Pass? A. Yes, sir.

Q. How is that? A. That is a little deeper than Tiger Pass.

Q. That is the deepest of all?

A. It is the same thing as Tiger Pass; it is one of the branches, at the sea end it forks out.

Q. So it is altogether the three passes, Tonfine Pass, Tiger Pass and Main Pass? A. Yes, sir.

Q. Tiger Pass is deeper than Main Pass? A. Yes, sir.

Q. Now, the second trip, you made years afterwards?

A. In 1894.

Q. How did you find the water at the mouth of Red Pass?

A. We came there in the morning; I went there in my pirogue; I was on a hunting trip; but I had another boat 42

feet long and 8 feet wide, and she is classed as to tonnage, 10 3-100 tons, and when we got there we found three inches of water; I went there to locate the channel, but I could not find it; I was going there in a northeast wind, in December, and the tide was low.

Q. What did you do?

A. I stayed there a day and a half, and the next evening we pulled on our anchor and went out over it. We used poles in getting out.

Q. How much water were you drawing? A. 15 inches.

Q. How far did you have to pole going out, before you got to the open Gulf? A. A quarter of a mile.

Q. Did you come back that way? A. Yes, sir.

Q. Did you have any difficulty in coming back?

A. We came back on the eighth morning; we stayed out there and nothing happened.

Q. Was that the same day?

A. No, sir; six or eight days afterwards; if I remember right we came in on New Year's Eve.

Q. Did you find any difference in the pass between the first and the second time you went; were the passes deeper, or shallower?

A. No, sir; about the same.

Q. These were the only times you went through?

A. Yes, sir.

Q. You have had occasion to go up and down the river frequently, on your business, I suppose; is there what is called the Jump?

A. There is the old Jump.

Q. But I was going to ask you another question. Is what is called the Jump; that is, a stream going from the Mississippi river, to the Gulf a natural river, or is it what you call a crevasse?

A. I have been informed it is the old Gilbert Canal, that had given way; of course, of my own knowledge, I do not know, I am not old enough; I was told so by the old residents.

By the Court:

Q. That was before your birth?

A. Well, I cannot say; we have in our neighborhood a few old residents and they tell me about that, that they used to carry oysters in the West Bay, from where it was claimed they carried oysters to New Orleans.

By Mr. Leovy:

Q. You were speaking of the bay being covered with grass; is there any difference between the bay, and the land that is on the sides of Red Pass is there grass on the land?

A. I will explain the nature of Red Pass. It is a bayou; when it goes to within a mile of the outskirts—as if this was the outskirts of the Gulf of Mexico; Tonfine Pass has grass growing on both sides of it, and when you get to the mouth of it, Red Pass, you find logs anchored on the bar. When we went hunting, we would find no trouble about the depth of the water, except the grass that is growing there, and if you go beyond that point, it is formed into bends, where there is no water, and here and there you find the same level; when you have high tide, you have the same water in the grass, as on either side.

Cross-examined by Mr. Mellen:

Q. What is your age? A. I am 44 years of age.

Q. This Jump has been a navigable stream, as far back as you can recollect has it not? A. Yes, sir, that is, I know parties going through there.

Q. With boats of considerable size?

A. Yes, sir, such as I have myself.

Q. You spoke of your boat; how long did you say your boat is?

A. 42 feet long; 41 feet 11 inches.

Q. And a little over 10 tons? A. A little over 10 tons, 10 30-100 gross tonnage.

Q. Did you go from the Mississippi river to West Bay and the Gulf of Mexico, through West Pass and Tonfine Pass, in your boat?

A. Yes, sir, but I worked very hard.

Q. Worked hard, how?

A. But putting lines out and anchors, and a capstan on both sides; and a launch on both sides; it was a flat bottom boat, and as we flanked through the mud, we flanked on each side.

Q. Where was that; what part of the journey; was it the whole length of the pass?

A. No, sir, at the outer end of Tonfine Pass.

Q. Just as you got out of the pass into open water?

A. Yes, sir, for a quarter of a mile.

Q. You did that for a quarter of a mile, out? A. Yes, sir.

Q. You said the water was extremely low, and the wind was blowing from the northwest? A. Yes, sir.

Q. That produces the lowest water, the wind blowing from the northwest?

A. Yes, sir; and the wind from the opposite point makes it higher?

Q. Yes, while the wind from the east southeast, brings the water from the bay? A. Yes, sir.

Q. So that the water was exceptionally low at that time?

A. Yes, sir.

Q. You say you are familiar with this map? A. Yes, sir.

Q. And that you find it to be a correct statement here, as to the depth of the water.

A. In every respect; I went as far as Biloxi on this side and found every nook and corner where it was sounded; and at night, I located the spot where I was at.

Q. This states, that out there, where you go into the bay from Red Pass, there are two feet of water; does that mean—you are familiar with the map—does that mean two feet at mean low tide; I do not want to catch you; please look at this map, you say you looked it over?

A. Wherever the sounding is on the chart it is a sounding at medium tide these soundings, if I understand the United States survey—but I speak with some of the officers and they told me—

Q. Never mind what they told you; we have the map that will tell you.

Mr. Mellen:—I want to call the attention of the court at this time, to what is written on this map as soundings. The soundings are expressed in fathoms, except on the dotted surface, where the depth of soundings is given in feet, the figures show the depths at mean low tide.

Q. Now, you say, the tide is from one to three feet; the high tide water rises about three feet; now ordinary tide is over a foot, is it not?

A. Not always; low tide is a great deal less than that; in low tide there are three inches of water on the bar of Tonfine Pass, at the mouth.

Q. I am speaking of the lowest water—I mean to say, what is the ordinary daily rise of water there?

A. I suppose two feet; in speaking of medium tide, I have reference to when the tide either stops rising or stops falling; when it stops rising, it is medium tide.

Q. Then the same map says, the tide is almost always less than two feet and a half and that the height that it rises is very variable, according to the winds, etc. You stated that Tiger Pass was just as deep as Red Pass. Please look at this map and tell me whether or not a person

reaching West Bay, or the Gulf at Tiger Pass, is not in a great deal more open water, than where he passes through Red Pass and Tonfine Pass, and if he wants to go north, does he not have to go through more open sea?

A. Since I have stated that I have gone through Tonfine Pass in 1894, I have been engaged in the oyster industry at Bayou Jack, to the westward of Tonfine Pass, and my men have been using Tiger Pass on account of the depth of water. I would have gone there years ago—I have passed through on these hunts, and examined some locations for oyster planting, and I would have gone in there, if Tonfine Pass had been deeper. When Tiger Pass had been deepened by the closing of this Red Pass I went into the trade. I carried on my boat 100 barrels of oysters, and went through Tiger Pass in a foot and eight inches of water, since the closing of this bayou.

Q. In going through Tiger Pass, going up to Bayou Jack—

A. Yes, sir, or in that neighborhood.

Q. Were you not compelled to go through a great deal more open sea, than you would, if you went through Red Pass?

A. Yes, sir, because Tiger Pass is further down.

Q. It is further down, and a great deal less shallower?

A. Well, it is about a mile, or a mile and a half lower down.

Q. It is a great deal more shallower?

A. No, sir, it is not shollower at all on the outside.

Q. Do you not have to travel in a more open and unsheltered sea, from the mouth of Tiger Pass than from Red Pass?

A. No, sir, it is about a mile and a quarter more travel in the sea, by going through Tiger Pass, than if you went through Tonfine Pass.

Q. Then you mean the two mouths are only a mile and a quarter apart?

A. Yes, sir; I never measured the distances but by the chart; they may have been a little more or little less; it is only according to my view from looking at the different places.

Q. You say the last time you went through with your boat, was in December, 1894. A. Yes, sir.

Q. You never went through Red Pass, except the two times that you speak of?

A. That is all I remember.

Q. You never went through with your oyster boats?

A. No, sir.

Q. You did not try? A. No, sir.

Q. Do you know that a great many others did go through there, with their boats?

A. I do not know positively; I heard of people going through the Jump, I do not know what boats they went through with, since I have been going through Tiger Pass; and I said to these people, "why do you not go through Tiger Pass as I do," and they said they did not go there. I heard some people asking about going through the Jump, but I do not know whether people did not go through the Tonfine Pass.

Q. Of course, you do not know it. I ask you, and that is a satisfactory answer about the people going through this pass.

A. No, sir,—well, I want to be impartial in this case.

Q. I suppose you are; but we want to have a clear understanding of this case. As you understand it, there is no difficulty at all in going through Red Pass with a boat of the tonnage of your boat, 10 tons, except when you have reached the mouth out at West Bay, where there is a little shoal, or sand bar?

A. Yes, sir, that is, right; there is no trouble in the pass at all.

Q. And you have difficulty out there when the tide is very low?

A. Yes, sir, I forgot to state; the last time I went with my boat I had with me three friends of mine, Dr. Thomas Abby and another, and when we came in the evening, from the river, at the entrance of Red Pass there was a flat boat which had located in the main pass, and we had to go around, because the channel was very narrow; in fact my boat touched on both sides she was 11 feet 5½. At the entrance of Red Pass, at the Jump, which comes in from the main pass, if I recollect aright, it was ¾ of a mile from the river, and the change from Main Pass to Red Pass we found the sunken flat boat, at the mouth of it, and we had to round the end of that flat boat, we found a very narrow channel, and lay there that night near a little steam paunch, because we could not go outside, and we turned back; but in the pass from that point to the outer end, there is plenty of water.

By Mr. Leovy:

Q. You speak of passing through not loaded, when you went through to the Gulf? A. In Red Pass?

Q. Yes?

A. Only our hunting traps, provisions, blankets, etc.

Q. When you speak of a boat of ten tons going through there, do you mean a boat going through there with 10 tons on it?

A. No, sir, I do not suppose she could carry that much in deep water, she would go under; her measurement was wrong and I had it re-measured, and she is only 5 92-100 tons?

Q. How much does she carry going through? Five tons?

A. No, sir, not through Tiger Pass.

Q. Or Tonfine Pass, could she go through with five tons on her?

A. No, sir.

GEORGE D. OSGOOD, sworn for the defendants, says:

By Mr. Leovy:

Q. Where do you live? A. At Port Eads.

Q. How long have you lived there? A. Between 9 and 12 years.

Q. You are a pilot? A. Yes, sir, I am.

Q. How long have you been a pilot?

A. I have been a pilot about 16 years.

Q. What kind of a pilot are you?

A. A river pilot.

Q. Have you had occasion by living down there to see the Jump, in that country? A. Yes, sir, I have.

Q. Have you been there often? A. I have.

Q. Did you ever have occasion to go through Red Pass?

A. I have at one time.

Q. Only one? A. Yes, sir.

Q. Did you ever go through Tiger Pass? A. Yes, sir.

Q. How often? A. I went through Tiger Pass several times.

Q. When did you go through Red Pass?

A. I think it was in the year 1894; I did not go through, in fact, I beg pardon; I attempted to go through Red Pass, and lay there 24 hours and it cost me just $300, on a lot of fish that I had in a boat drawing 22 inches of water.

Q. Was it your own boat? A. Yes, sir, a sloop called the Phillipine.

Q. Was that in Tonfine Pass, or Red Pass?

A. It was in Tonfine Pass; I came up a flat bar there,

and ran into Tonfine Pass and got stuck in the mud there; I tried to force the boat through with a sail and a pole and kedge anchor.

Q. You were then returning to the Mississippi river?

A. Yes, sir.

Q. Where were you when you were grounded, were you in the pass, or outside?

A. No, sir, I was inside the pass about three hundred yards from the mouth of the pass.

Q. 300 yards from the mouth of the pass? A. Yes, sir.

Q. How much water were you drawing? A. 22 inches.

Q. And you remained there 24 hours?

A. Yes, sir, or probably more; I cannot say how long I was lying there, but 24 hours, or probably more.

Q. What did you do then, did you come away?

A. I went back by throwing half my cargo overboard, I went through coming back through Southwest Pass.

Q. Do you know anything about the oyster business down there, how the oyster boats come back?

A. Sometimes they come through Tiger Pass, and sometimes through Main Pass, and sometimes they come round through Southwest Pass way, because there is not water enough for these vessels to enter the Jump, when they are loaded, or partially loaded.

Q. Do you know anything about Socola's canal?

A. I do not know about that, but very little; I know there were boats there because I have been on boats here in the river that towed them up.

Q. You know oyster boats come through Socola's canal to New Orleans?

A. I do not know exactly where they come from, but from the westward, that way.

Q. Could those boats loaded with oysters come through Tonfine Pass?

A. I do not think they could.

Q. How do you know of it?

A. Well, from what knowledge I have of the pass.

Q. Just beyond the mouth of Red Pass is there any channel?

A. There is none, it is a mud flat.

Q. About how wide is that mud flat?

A. It ranges from a mile and a quarter to two miles; with about 18 inches or 2 feet on the outward edge of the

flat; there is about two feet of water, but close in there are from 8 to 10 inches in high water, and then the water has to be over the grass.

Cross-examined by Mr. Mellen:

Q. Close in there is it very high and dry? A. Yes, sir.

Q. Right at the mouth of Tonfine Pass? A. Yes, sir, right at the mouth.

Q. You came out there and met high and dry land?

A. Yes, sir, in low tide; that is in the northeast or northwest wind.

Q. How deep did you say the water was at high tide?

A. It ranges from 18 to 10 or 12 inches.

Q. From 8 to 10?

A. From 18 inches to 10 or 12, it must be extreme high tide at that.

Q. 18 inches to 10 or 12?

A. Yes, sir, in high tide, in a southwesterly gale it has two feet of water, the water is over the marsh then.

Q. How much does the water rise in the high tide? A. 18 inches.

Q. That is about as high as the water rises?

A. Yes, sir, that is high tide.

Q. That is a very high tide? A. Yes, sir, very high.

By the Court:

Q. Do you mean to say that the greatest depth of water there, at the mouth of Tonfine Pass, is 18 inches?

A. Yes, sir.

Q. That it is never more than 18 inches?

A. No, sir, not to my knowledge; that is, I have not heard; of course, on the outer edge of the flat towards the sea where the salt water has an action on the river sand, the water is two feet, that is a mile and a quarter or probably two miles out.

Q. How many times have you gone through Tonfine Pass?

A. I cannot say the number, because before I became a pilot, I was a duck hunter and fisherman, from boyhood up.

Q. You have gone through it a great many times? A. Yes, sir.

Q. In what kind of a boat would you go through?

A. On a pirogue and skiff?

By Mr. Mellen:

Q. Now, is there not in front there, a way to get inside towards the channel; is there one way where the water might be a little deeper than at the other? A. None, of my personal knowledge.

Q. Do you claim to know much about it?

A. I dopit is a mud flat all the way, from Sandy Point along the Main Pass.

Q. What size boat was this that you speak of, in which you went through in 1894?

A. I did not through the pass with no boat at all; I told you I was stuck on the bar of the pass, on the flat.

Q. You were stuck there? A. Yes, sir.

Q. And your boat was drawing only 22 inches? A. Yes, sir.

Q. How much water was there?

A. There was at that time about 16 or 18 inches, something like that, it did not range over 18 inches.

Q. The wind was blowing from the northwest?

A. No, sir, from a southerly direction.

Q. What month was it in? A. In the month of March.

Q. It that a month of high tides?

A. Yes, sir, spring tides are on then.

Q. The water was very high then?

A. Yes, sir, it was supposed to be high tide at that time.

Q. There cannot be any mistake about your boat drawing only 22 inches?

A. No, sir, because I can produce the boat in Lake Pontchartrain to-day.

Q. What was the size of that boat? A. My boat was five tons.

Q. You had a pretty good load on it then, had you not?

A. Yes, sir, I had.

Q. How much of a load?

A. I suppose I had at that time 3000 pounds of fish and 2200 pound of ice.

Q. How long is that boat? A. My boat was 35 feet long.

Q. What is its width? A. 10 feet.

By the Court:

Q. You say that you have been hunting there, through

that country ever since you were a boy? A. Yes, sir, I have.

Q. What made you try to go into that pass with such a load as that?

A. It was necessity compelled me to do so; there was a gale of wind that forced me in there.

By Mr. Mellen:

Q. You expected to be able to go through?

A. Yes, sir, I thought I could force my vessel through the mud, which I have done many times, forcing it through the soft mud.

Q. What has been your occupation, for the past few years? A. A pilot.

Q. You say a river pilot? A. A river pilot, yes, sir.

Q. For whom? A. For no one in particular.

Q. Any one who wishes to employ you? A. Any one who employs me.

Q. You have been in the employ, I suppose of Mr. Leovy?

A. No, sir, I never have been in the employ of Mr. Leovy; he has never had anything that I could be employed at.

By Mr. Leovy:

Q. You are a licensed pilot? A. Yes, sir, I am, I can produce my license.

FRANK G. BLASE, sworn for the defendant, says:

By Mr. Leovy:

Q. You live down near the Jump? A. Yes, sir.

Q. How long have you lived there? A. About 28 years.

Q. Then you know all about the passes there?

A. Yes, sir.

Q. So far as you know, is the Jump, or these passes, a natural stream, or was it a crevasse?

A. Well, by hearsay, I am rather young and I have no knowledge of the canal, myself, but by all the old residents, it is said to be a crevasse, it is Gilbert's bayou.

Q. Gilbert's Bayou, or canal?

A. Gilbert's bayou or canal, it had locks in it.

Mr. Mellen renews his objection on behalf of the government.

Q. The Jump is a break in the bank near the river?
A. Yes, sir.
Q. How wide is it about there? A. The Jump itself?
Q. Yes, or about? A. I suppose it is about two arpents.
Q. That is about 400 feet? A. Yes, sir.
Q. Two arpents is about 400 feet? A. Yes, sir.
Q. How far is it from the Mississippi river, before you get to Red Pass?
A. At the head of the dam?
Q. Yes? A. Yes, sir, that is what I mean, from the river to the dam, is a half mile.

By the Court:
Q. Then from the river to the dam is the beginning of Red Pass?
A. Well, there is the difference of the two blocks, we will say about 600 feet from the head of Red Pass.

By Mr. Leovy:
Q. About half a mile from the Mississippi river?
A. Yes, sir.
Q. Spanish Pass is closed? A. Yes, sir.
Q. Did not boats go through Spanish Pass? A. Yes, sir, steamboats.
Q. Can you tell us whether these passes have deepened, or shallowed in the last 10 or 15 years?
A. They are filling and narrowing right straight along and entirely closed, a good many of them, by Nature.
Q. How about the Williams Pass?
A. That would have been closed years ago, if it had not been for the dredging of Mr. Leovy.
Q. Then the dredging by Mr. Augustus Leovy drained it?
A. Yes, sir.
Q. It would have been closed years ago from the natural sediment?
A. Yes, sir, from the Mississippi river.
Q. Was Red Pass getting shallower? A. Yes, sir, very much.
Q. In former years, did the boats go through from Red Pass to the Gulf, from the Mississippi river? A. Yes, sir.
Q. Have they done it within the last 10 years?
A. Yes, sir, within the last 10 years I have seen them.

Q. Light boats? A. Yes, sir.

Q. Did any go through Red Pass? A. No, sir, not that I know of.

Q. Some years since, small boats have gone through Tonfine Pass?

A. I beg your pardon, you mean Red Pass five years ago?

Q. Yes?

A. Well, I am acquainted with that country and we all call it Tonfine Pass; Red Pass was not navigated for 10 years, not even by a pirogue.

Q. But it used to be navigable by luggers and sail boats? A. Yes, sir.

Q. Now, when you would go, before Red Pass was closed, you went through Tonfine Pass? A. Yes, sir.

Q. What was your business; what were you engaged in?

A. I have been recently running a lugger; I have been an oyster fisherman I was interested in the oyster industry.

Q. Have you known much about that oyster business?

A. Well, pretty much, yes, sir.

Q. Through what passes do you go to get oysters?

A. I use the Main Pass and Tiger Pass.

Q. Are they deeper than Red Pass? A. Than Tonfine Pass?

Q. Yes, than Tonfine Pass?

A. Yes, sir, it has been the main passage all the time from Tiger Pass, particularly since Red Pass was closed.

Q. But I speak of them before that?

A. Well, it is not much deeper.

Q. But it was somewhat deeper? A. Yes, sir, it was somewhat deeper.

Q. Now, I want to ask you—you are living down there and know all about the business going on, did the oyster boats, when loaded, return back through Red Pass?

A. No, sir, not as I know of, not loaded boats, in Tonfine Pass?

Q. Yes? A. No, sir, they did not.

Q. The oyster boats would go out that way, some of them might, how would they return when they were loaded?

A. They would go down Main Pass, or Tiger Pass, Main Pass particularly.

Q. Did any of them return to Socola?

A. Sometimes they came in Socola Pass or Tonfine Pass.

Q. You never knew of loaded boats through Tonfine Pass?

A. No, sir, never.

Q. How did you come with your oyster boats?

A. I never handled oysters through that passage.

Q. How did you come?

A. When I passed Tiger Pass, I passed light.

Q. When you came with a loaded boat, how did you come?

A. I came from the westward, independent of them.

Q. Did you ever go to the end of the Tonfine Pass? A. Yes, sir.

Q. What for?

A. I was in hunting some time ago, myself and my father-in-law, eight years ago.

Q. How did you find the water there?

A. Unfortunately for myself, there was no water at all, hardly.

Q. How much did your boat draw? A. I was in a pirogue.

Q. Did you have difficulty in going there with a pirogue?

A. No, sir, everybody knows what a pirogue is; what we have to have is a pushing pole; I could not handle a pirogue except by a pushing pole, that is, on the bar.

Q. After you got out of Tonfine Pass at these mouths you had that trouble?

A. Yes, sir.

Q. How much water was on them?

A. Well, I was along in a pirogue, and a pirogue goes as well on soft mud as on water; I could not tell you, but not more than three inches of water, or four at the most; it was a soft bottom.

Q. That was the lowest, you do not know what it was during high tide?

A. No, sir.

Cross-examined by Mr. Mellen:

Q. What time of year was that? A. I said about eight years ago.

Q. What time of year? A. In the winter, duck hunting.

Q. The water is usually very low at the time of duck hunting?

A. Well, there is a big variation of tides on the sea shore.

Q. But at that season the wind is from the north and it is very low, usually. The water then is usually very low? A. Yes, sir

Q. Now, thinking that your pirogue did not draw much water, you were not careful to find where the deepest water was?

A. No, sir, I told you I tried it, and had bother, of using this pole. I killed five ducks and they fell into the channel; how I fix to say there was so little water is, that the ducks remained where they fell, right in the channel.

Q. How long did you stay there?

A. I stayed there about three hours.

Q. That was at low tide? A. Yes, sir.

Q. Now, the oyster boats sometimes got their oysters, eastward, did they not? A. Yes, sir.

Q. They came over to plant them in West Bay, did they not? A. Yes, sir.

Q. Now did not these vessels used to come with oyster luggers through Cubitt's Gap, up to the Jump? A. Yes, sir.

Q. Up Tonfine Pass and West Pass to West Bay?

A. No, sir, not through Tonfine Pass that I know of.

Q. Several witnesses have testified to that fact; do you pretend to say it is not so?

A. No, sir, I am not supposed to know all these things, but I am telling you what has occurred to me.

Q. You do not say it was impossible?

A. It was impossible while I was there.

Q. That was in the winter?

A. Yes, sir, that is the time the oyster boats run, they do not run in summer during high tides.

Q. Now, you say that before Red Pass was closed, that Tiger Pass was not much deeper than Red Pass, if any?

A. At that time, no, sir, they used to take the Main Pass, or the main channel.

Q. You never went through Red Pass with a boat at all?

A. No, sir; not with a sail boat.

Q. You never tried to?

A. No, sir, I was scared to try it, because I was aware there was no water there; I passed with smaller boats, with a ton and a half or two ton boats through Tiger Pass which is only a mile different from the two mouths, or by the river, in distance.

Q. Only a mile apart, the mouths at West Bay? A. Yes, sir.

Q. How much water did you ever see at the mouth of Red Pass; what is the most water you ever saw? A. In the Mississippi?

Q. No, in West Bay?

A. Well, I have never been there for eight years, and that is the time I struck that mud flat.

Q. You have not been there for eight years? A. No, sir.

Q. And that was five years, or more, before it was closed? A. Yes, sir.

Q. You lived down that way? A. Yes, sir.

Q. And a great many luggermen protested against the closing of that Pass, did they not? A. So I understand.

Q. You understood that at the time it was being closed, did you not?

A. No, sir, not until here at court.

Q. You never heard of it until now?

A. No, sir; I do not know who they were, or where they are from; I doubt that even these men who are here, ever went through that pass with boats.

Q. You think they were perjuring themselves? A. I think so.

By the Court:

Q. What reason have you to so testify?

A. When a man testifies there were four feet of water on the bar.

Q. How do you know that? A. It was said so.

Q. Were you listening to what was being said inside here?

A. No sir, I was listening outside.

Q. Unless you have reason to believe that those men have committed perjury, I advise you not to speak as you have? A. I do not mean perjury, no sir.

By Mr. Mellen:

Q. How did you hear about what the witnesses were testifying?

A. I heard it from themselves, these oystermen, because I understand their language.

Q. What language did they speak? A. Austrian.

Q. The Slav language? A. Yes sir.

Q. Do you understand it?

A. No sir, I do not understand it correctly, but I understand some of them.

Q. You say you heard one of the witnesses who was here on the stand, say something, tell us what he stated?

A. I understood him to say there was four feet of water on the bar.

Q. You understood him to say to somebody else out there?

A. Yes, sir.

Q. Did you inquire of any one what had been tesified to here?

A. No, sir.

Q. Did anybody tell you?

A. No, sir, I only heard the rumor out there.

Q. You heard the rumor?

A. No, sir; I do not say I know who said so, I only heard the rumor, I do not know who said so.

Q. You do not know who said so? A. No sir, I do not.

Q. Which one of these men do you think did not go through Red Pass with his boat?

A. I said I doubted I did not see them, I understood some of them had been there.

Q. Of which one have you doubts?

A. I said some of them, I said, I doubted whether some of them were through Red Pass.

Q. Can you tell me which one you have doubts about?

A. No, sir, it is only an impression, I based it that way, because I know that as far as I can see, they want the pass open.

Q. You do not want the pass open? A. Us?

Q. Yes? A. No, sir, not if it is possible.

Q. You want it closed? A. Yes, sir.

Q. What interest have you got in having it closed?

A. The interest which we have to keep it closed is the safety of our orchards for 10 miles front on the Mississippi.

Q. Have you got an orchard down there? A. Yes, sir.

Q. Of course, you do not consider the interests of these other people who might want to have a shorter route; you do not consider their interests at all?

A. I have a boat and an orchard.

Q. But your orchard interest is greater to you, than your boat?

A. Yes, sir, there being one mile difference between the two outlets, I do not think we should be sacrificed, and exposed to the overflow of the Mississippi river that distance for the accommodation of the navigation; just for one mile difference from one mouth to the other.

Q. You are opposed to have any evidence in this case to show satisfactorily that loaded boats could go through Red Pass?

A. Yes, sir.

Q. You do not want that to be shown?

A. Well, I do not want that to be shown because I do not think it can be shown for loaded boats to go through there.

Q. What do you call a loaded boat?

A. A loaded boat is these sail luggers that draw three and a half feet when loaded.

Q. Loaded with how many barrels of oysters?

A. Well, it is according to capacity; a small boat could go quicker with its load, than a bigger boat of the same kind.

Q. Say a boat carrying 100 barrels of oysters?

A. They may draw four feet of water, pretty near.

Q. You do not think of any ever carrying from 90 to 100 barrels of oysters through there?

A. No, sir, not loaded, not for the past 8 or 10 years.

Q. Not for the past 8 or 10 years? A. No, sir.

Q. When was the last time you were there? A. Eight years ago.

Q. You have not seen Red Pass since then?

A. No, sir, not since that time, but it has been shoaling, that I know of.

Q. You say you have not seen it, but you know it is shoaling, how do you know that?

A. Because 15 years ago, they used to pass straight down there, but the shorter pass down, it was not going from east to west.

Q. You do not know what is going on for the past 8 years?

A. No, sir, but I know it is shoaling at its mouth.

Q. The mouth of the Jump? A. Yes, sir.

Q. When did you measure it?

A. I never measured it, but I know there was more water, by going through in pirogues.

Q. How do you know there was more water, if you have not measured it?

A. After a man is going about with his pirogue, he measures with his pole, and he is going the same way in years after, he can tell, particularly when there is a barge run ashore.

Q. You say the last time you went there, you touched the bottom with a pirogue paddle, at the Jump? A. Yes, sir.

Q. How long is a paddle? A. Five feet long.

Q. How deep do you place it in the water?

A. Two and a half feet.

Q. Was the water where that dam is put, only two and a half feet?

A. 200 yards from the dam.

Q. Which way from the dam?

A. Right towards the river, right at its mouth.

Q. What time of year was that?

A. In the ordinary tides, low river.

Q. How far did you go into the pass?

A. I used to go to a neighbors, sometimes there were some inhabitants lived down there, a mile down.

Q. Do you live down there where Mr. Leovy lives?

A. I live about four blocks from him.

By Mr. Leovy:

Q. You say you lived in that neighborhood how many years?

A. About 28 years.

Q. Just at the Jump? A. Yes, sir.

Q. So that you have known what was going on there pretty well all the time?

A. Yes, sir.

Q. Did you go to live anywhere else, during that 28 years?

A. Well, I have been on and off once in a while, but my residence has been there for about 28 years.

GEORGE SCHOMBERGER, sworn for the defendants, says:

By Mr. Leovy:

Q. You are living at Buras? A. Yes, sir.

Q. About three miles from the terminus of the railroad? A. Yes, sir.

Q. And about 12 miles from the Jump?

A. Yes, sir, good 12 miles.

Q. You have an orange orchard there?

A. Yes, sir, I have a couple of orange orchards there.

Q. How long have you lived down there?

A. Since 1867 I lived down there.

Q. You have been living in the same place?

A. Well, for two or three years I lived about half a mile further up, but I have lived in this same place since 1871.

Q. You are President of the Police Jury, are you not? A. Yes, sir.

Q. You are also President of the Levee Board? A. Yes, sir.

Q. How long have you been president of the Levee Board?

A. Well, I am President of the Levée Board since that levee district has been in existence, four years ago.

Q. How long have you been President of the Police Jury?

A. I have been President of the Police Jury for two years, but I have been a member of the Police Jury for 16 years.

Q. You have been a member of the Police Jury 16 years and President of the Police Jury two years? A. Yes, sir.

Q. What are the duties of the Police Jury of this Parish; what do they do?

A. Well, the duties of the Police Jury formerly was to look out for the levees, and since the Levee District has been in existence, it was taken out of the hands of the Police Jury; then to form the budget every year; collect money enough to pay running expenses; to see that the roads are kept in pretty fair condition; and if any epidemic breaks out, the Police Jury is the Board of Health in the Parish.

Q. Before the creation of the Levee Board, it was the duty of the Police Jury to attend to levees and crevasses?

A. Well, before the Levee Board was formed, we belonged to the Levee District too; and when the State stopped it, the district was put over to the Third Levee District; but we only got one new levee built, and the balance of the Parish had to see to pay for it.

Q. During the 16 years that you have been a member of the Police Jury, have you closed any crevasses?

A. We closed a great many crevasses, yes sir; we did a

couple of times, and every high water spent a great deal of money in this way.

Q. Where there were openings in the river banks did you close them?

A. We closed them; there was a petition presented by the citizens because they had caused damage; it was at the Bayou Lanac and the Bayou Heck.

Q. Did you close Spanish Pass?

A. We closed Spanish Pass about 12 years ago; we closed it 12 miles up the river; we formed a company and raised money to shut up Spanish Pass, I was one of the company to make the collection; and we had $160 collected; and the men from the Jump, with a list of who contributed it.

By the Court:

Q. I understand Spanish Pass was closed by the State?

A. Well, we made the collections, under Mr. Theodore Wilkinson; he tried to have it closed and through his influence, we had it done.

Q. Colonel Lewis testifies that Spanish Pass was closed by the State?

A. I only said we tried to close it, and collected the money to pay for the closing it, as it would benefit the orange orchards for 15 miles.

By Mr. Leovy:

Q. You say the State closed it?

A. Yes, sir, the State closed it, but we collected the money to do it.

Q. What was the reason that Spanish Pass was closed?

A. When we had high river, for 15 miles up, we could not drain our lands it was overflowed; the land from Fort Jackson down for 10 miles and for five miles up above it is the finest place for orange culture in the State. The principal thing is drainage, and for 15 to 18 years we always have been trying to close them up.

Q. Spanish Pass is part of the Jump? A. Yes, sir.

Q. The same as Red Pass? A. Yes, sir.

Q. Now if Red Pass were not closed, would there be any damage?

A. Certainly, if Red Pass were not closed; there were some bayous lead from Red Pass into Spanish Pass, and when the river is very high it keeps feeding into the canal, and runs in, as well as Red Pass.

Q. You are President of the Levee Board, your levees are built very high, down at the Jump? A. Yes, sir.

Q. Is there any use in having the levee built up high, if the water is permitted to come back? A. No, sir.

Q. Therefore the closing of Red Pass is a part of the work of the leveé system? A. Yes, sir.

Q. Have you connected the dam at Red Pass?

The Court, to Mr. Leovy:

You have put the State engineer on the stand, and he certainly made it very clear that the State had not built this dam across Red Pass; the State levee only extended down towards Red Pass, but not to that dam. Now this testimony, that it is part of the levee system, what does that mean?

Mr. Leovy—I want to prove by this witness, that the levee system is utterly worthless if you permit the waters from a crevasse to get behind a levee, as it destroys its utility.

The Court—Yes, but I want it clearly presented that this Red Pass was not closed by the State of Louisiana.

Mr. Leovy—We have stated over and over again, that the Police Jury ordered Red Pass to be closed, and appointed a levee syndic to do it; there for the State did it, through its organized instrumentality, the Police Jury.

Mr. Leovy—I want to ask the witness this question, if it is not within his knowledge, that a resolution was passed by the Police Jury of the parish of Plaquemine, ordering the closing of this Red Pass.

Mr. Mellen for the United States objects on the ground that it does not make any difference whether the Police Jury, or the Levee Board, or anybody else ordered, except the Secretary of War authorized it.

The Court—You may be right in your objection, and I may eventually so charge the jury, but for the present I think it had better go in.

Q. Did the Police Jury pass a resolution instructing the syndic to close Red Pass?

Mr. Mellen objects, on the ground that the resolution is in writing and should be produced.

Mr. Leovy for the defendant offers in evidence the resolution adopted by the Police Jury of the Parish of Plaquemine authorizing the closing of Red Pass, dated July 1, 1890, and marked Exhibit "A."

Q. Was that resolution ever repealed, or rescinded to your knowledge?

A. No, sir, the Police Jury of the Parish of Plaquemine granted the right and authorized Mr. Leovy to close Red Pass. The Police Jury took it for granted that the Jump was nothing more than a crevasse, a breaking loose of the levee in 1845, or thereabouts, as shown by the oldest inhabitant, and the Police Jury had the right to shut the crevasse. It was thought that the Police Jury of 40 years ago should have shut it, or had the right to shut it right away, and on that ground, we granted the permission.

Q. Was there any Levee Board in 1890, when this resolution was passed?

A. No, sir.

Q. And you passed this resolution under your supposed authority to close crevasses? A. Yes, sir.

Q. And you believed it was a crevasse?

A. It was a large petition presented to the Police Jury by 200 or 300 property holders asking the Police Jury to shut that place.

Q. Who represents the Board in carrying out these things in the Parish; do you have syndics?

A. Yes, sir, syndics for each ward.

Q. How many wards?

A. 10 wards in the Parish of Plaquemine in 1893; when that storm destroyed property in Plaquemine, the Police Jury then in existence, discharged the syndics, and each member of the Police Jury became the syndic of his ward, without pay, to save the revenues for three or four years.

Q. Who was the Syndic in 1895, in the 5th Ward?

A. Mr. Robert S. Leovy.

Q. What is the official newspaper in the parish of Plaquemine?

A. The Protector.

Q. I notice an advertisement in that paper of October 26th, 1895, stating that Mr. Robert S. Leovy, was syndic at that time? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. Was that newspaper the official journal at that time? A. Yes, sir.

Mr. Leovy for the defendants offers the advertisement in the newspaper Protector, on behalf of the defendants, marked "B."

Mr. Mellen for the government renews his objection to the admission of this offer in evidence. And this objection

applies to this testimony as well as to the testimony heretofore taken, on this subject.

Mr. Leovy for the defendants offers another resolution of the Police Jury of the Parish of Plaquemine, being an extract from the minutes of its proceedings dated February 8th, 1898.

Subject to the same objection of Mr. Mellen and on the further ground that it is in the nature of self-serving evidence.

Q. Was Mr. Robert S. Leovy a member of the Police Jury at any time?

A. No, sir.

Q. Was he in 1898? A. No, sir; he was not syndic any more.

The court admits the resolution dated February 8th, 1898, subject to the objection of Mr. Mellen. It is marked "C."

Mr. Leovy for the defendants also offers a resolution of the Buras Levee Board dated November 20th, 1897, marked "D."

Mr. Mellen for the Government objects to the resolution of the Board November 20th, 1897, passed long after the closing of Red Pass and after the indictment in this case had been found; and on the further ground, that it has been shown that the Levee Board had nothing to do with the Red Pass at all.

The court sustains this objection and excludes the resolution, allowing exception to the defendants.

Q. Have you built any levee, under your authority of the position you hold as President of the Levee Board, connecting this dam, or between this Red Pass dam and the levees?

A. We built a piece between the Spanish Pass and Red Pass to connect them together, making it one line.

Q. So the levee down to the Jump is one line, being the levee in front on the Mississippi river, and then its extension to the Red Pass dam?

A. Yes, sir.

Q. So it is now all one levee? A. Yes, sir, all one levee.

Q. And that is all on the north, or upper side of the Jump, so it is within the levee district? A. Yes, sir, within the levee district.

Q. As I understood, you stated that you were not living many miles from Red Pass; will you state whether this Red

Pass dam was built nearly three years ago? A. Yes, sir.

Q. State what effect it has had altogether on your Parish?

Mr. Mellen makes the same objection; same ruling by the court.

A. Well, we have got it drained for 15 miles on the river, giving us splendid drainage. The property in the 5th Ward before those two passes were shut was valued at about $5,000; to-day it is valued at $100,000, and if the passes are not opened for five years more, it will be three times as much if the pass is opened again, it will be all ruined.

Q. Are the people of the Parish making any opposition to the closing of this pass? A. No, sir, only the fishermen.

Q. Have there been any improvements made at the Jump in building up orange orchards? A. Yes, sir.

Q. Have you planted your orchard further back from the Mississippi since this pass has been closed up?

A. Yes, sir, I think you can plant it to twice the depth.

Q. You stated these lands are very valuable, these orange orchards; state to the jury why these lands are so very valuable?

A. Well, if a man attends to an orchard, it bring him an income; I have two arpents front a mile below, and I was offered $6000 for them; but this year it will bring me $3000 earnings; it is two arpents front and three deep.

Q. That is, six arpents? A. Yes, sir.

Q. You netted $6000 on them?

A. I could sell the land to Mr. Socola, but it will bring me in an income of from $3000 to $6000 regularly.

Q. Were the trees hurt this year, by the levee?

A. Well, this year it was injured.

Q. Two or three years before, when all the orchards above were injured, above Port Jackson, up to the Parish of Jefferson, were your orchards down there injured? A. No, sir.

Q. That is why the lands in that part of the country are so valuable?

A. Yes, sir.

Cross-examined by Mr. Mellen:

Q. Does Mr. Leovy, the gentleman who has just been questioning you, own any orange orchard down there?

A. It belongs to the Leovy family; they have got an orchard over in the 5th Ward, about an acre front; then

they have got an orchard down at the Jump. Mr. Henry Leovy has an orange orchard in the 5th ward, but I cannot say as to others.

Q. This resolution that was passed in 1890, was not acted upon until 1895.

A. Well, that is a thing I cannot tell about about the year, which year it was closed in.

Q. If the dam was built in 1895; in the fall of 1895, what brought up this question in 1895?

A. Well, the damages it does always to our property by having it opened, I expect that brought it up?

Q. Who brought it up; did Mr. Leovy ask the Board to permit him to close it?

A. Well, not Mr. Leovy alone; I made the statement that a petition was presented to the Police Jury from the lower part of the Parish of Plaquemine to shut up Red Pass.

Q. Did Mr. Leovy, father and son take an active part in that matter?

A. Well, the Police Jury appointed Mr. Robert S. Leovy, as syndic; you can see in the resolution what Mr. Leovy presented; the petition and it was granted; that the Parish of Plaquemine was very poor and he was asked by the other property holders to pay their expenses.

Q. Was it not understood, that whoever should close it, should close it at his own risk? A. At his own expense.

Q. And at his own risk also?

A. Well, it is so long ago, I do not know it now.

Q. You do not exactly answer my question, did not Mr. Leovy, or the two Mr. Leovys take an active interest in being authorized to take charge of this work, by the Police Jury?

A. Well, I expect the men were interested as much as any other property holders, may be more, in that district.

Q. How did the Police Jury come to select Mr. Leovy?

A. Through that storm of 1893; I made the statement that our Parish was poor, and we could not pay our syndics, and the members of the Police Jury became the syndics without pay, and it gave the right to each member of the Police Jury to select one who would not ask pay for his services; and I asked Mr. Leovy if he would serve and he said yes, so I appointed him.

Q. Did he not want you to appoint him?

A. I asked him if he would accept; he said yes, and I appointed him.

Q. Did he not request to be appointed? A. No, sir.

Q. Do you not think he sought the opportunity to be appointed?

Mr. Leovy objects to the question.

Q. Do you not know, that Mr. Leovy, either one, or the other, or both, sought the authorization of the Police Jury to do this work; did they not ask for it?

A. It was asked in a petition signed by a hundred men, and Mr. Leovy signed also.

A. Do you know who paid for the work?

A. I never asked who paid for the work, I expect Mr. Leovy paid for the work.

Q. Do you not know that Mr. Leovy, both father and son, paid for the work?

A. I do not know who paid; there was never a bill presented to the Police Jury, for it.

Q. The father and son are in business together, are they not?

A. I believe so.

Q. They were at the time in business together, were they not?

A. Well, I do not know; I am not positive, if Mr. Augustus and Robert Leovy were partners in any business; they have a store, I understand, but I do not know whether it is kept by Mr. Robert S. Leovy or not.

Q. You know that the Police Jury did not pay for the work?

A. The Police Jury did not pay for it, I am positive about that.

Q. How long have you lived in that part of the country?

A. I lived in that part of the country since 1871.

Q. How long have you been familiar with that section of the country?

A. I believe I am familiar with that section of the country since I have been living there.

Q. Not before that? A. No, sir, not much.

Q. When you went there in 1871, the Jump was then used, as it is now, was it not?

A. Well the Jump was more open than it is now; there may be 20 or 30 passes entirely shut.

Q. But I mean the Jump itself? A. You mean the Main Pass?

Q. Yes? A. I expect it is about the same now, as it was then.

Q. That was navigable in 1871, the Main Pass? A. Yes, sir, it was.

Q. You do not know how old that Main Pass is?

A. Well about—some old residents of the Parish of Plaquemine have told me that the land broke somewhere about 1844, or 1845, it is conceded it is nothing else but a crevasse.

Q. You say they considered it a crevasse?

A. And the Police Jury would not allow them time to have it shut.

Q. You think that the Police Jury would have the right to close the Jump to-day?

A. We take it that way; if we had the money, we would close the crevasse; we may be mistaken.

Q. What Parish is Southwest pass in?

A. In the Parish of Plaquemine.

Q. You had the right to close that too?

A. Well, we never claimed that right; there were boats always there; but that is a crevasse.

Q. That is not as much of a crevasse as the other? A. Which?

Q. Southwest Pass?

A. Well, that pass is open, I do not know, but still Captain Eads ——

Q. That has been open a little bit longer than the Jump, and that is the reason you would not have the right to close that?

A. We never claimed the right to close that, but Captain Eads put two or three dams across the pass.

Q. But Captain Eads was working for the United States government, was he not? A. I suppose so.

By Mr. Leovy:

Q. Is there not a difference between the open mouth of a river, and a crevasse that breaks in the bank of a river; do you consider the mouth of the river, a crevasse?

A. No, sir, it is the mouth of the river; this pass always was a pass, but the Jump is a crevasse.

Q. You say these passes which make the mouth were there always?

A. Yes, sir, 100 years old.

Q. Do you consider that a crevasse, which is a break in the bank of the river, occurring in 1845? A. Yes, sir.

By Mr. Mellen:

Q. Do you recollect who presented the petition of the property holders, to close that Red Pass?

A. I believe, but I cannot say, Mr. Buras. .. ..

ANDREW BURAS, sworn for the defendants, says:

By Mr. Leovy:

Q. You live down in the Buras Settlement, near the Jump?

A. The Jump.

Q. How long have you lived there?

A. About eight years going on nine years now.

Q. What business are you engaged in? A. I am fishing, and in oysters.

Q. Do you own a lugger? A. Yes, sir.

Q. Did you have occasion to go through the passes going into the Gulf?

A. Yes, sir.

Q. For how many years have you been going through?

A. Well, I went a couple of times, about eight or ten times.

Q. You went out with your lugger?

A. No, sir; I went out with one little skiff, carrying eight barrels of oysters the last time.

Q. You went eight or ten times with that skiff? A. Yes, sir.

Q. When was that?

A. After the pass was closed up.

Q. Did you go out before that pass was closed up?

A. In a little skiff.

Q. When was that?

A. The last time I went out was six months before Mr. Leovy closed up the pass; more or less, but something like six or eight months?

Q. Did you have any trouble in getting into the Gulf?

A. Well, I can tell you when I was coming in from my camp; I lived there five miles more or less and had no water to my camp; and I went round to get to the pass; I had a water barrel on board my skiff; the skiff was in six inches of water; and I came round to the pass and it was a pretty good ways; and when I came there, I stopped on the flat.

Q. Got aground?

A. Yes, sir, along with a little boy fishing for fish, he had a hand line and he assisted me to get in.

Q. There were four or six inches of water?

A. There were four inches of water and the skiff drew six inches.

Q. That was outside Tonfine Pass? A. Yes, sir.

Q. Which was a marsh or a bar?

A. Well, it was a bar, about a mile and a half, more or less, dry.

Q. What was that, a mud flat?

A. A mud flat or sand bar, on the top it was a little like glue.

Q. How long were you getting in with your skiff; how long did it take you to get through Tonfine Pass? A. 2 or 3 hours.

Q. Did you ever try before that?

A. Well, I passed there, every time I pass there, the skiff was dragged on the flat.

Q. Was that all in the same year, or different years?

A. Different years.

Q. What was the deepest water you ever saw on that mud flat?

A. Well, maybe a foot or a foot and a half, of course, I did not take notice I never measured it.

Q. What was the first time you went through with your skiff, how many years ago? A. Something about seven years ago.

Q. That is, you continued to go, up to the time it was closed?

A. Well, when the other pass was open, I went there.

Q. Did you ever go through Tiger Pass? A. Yes, sir.

Q. Is that as good as Red Pass and as deep?

A. It is better, well, a little better.

Q. What about Main Pass?

A. It is about the same; I will tell you how it is; if you get a hard wind from the south, of course, the tide gets higher; but it they come from the northeast, everything is dry.

Q. How deep is the deepest, or medium height of the tide?

A. I cannot say.

Q. Did you ever see it over two feet high? A. No, sir.

Q. Never?

A. No, sir, lately I passed through Tiger with my lugger George; the lugger was drawing about two feet and a half of water, and we had to throw our oysters overboard to get through.

Q. Did you ever know boats loaded with oysters to come through Red Pass?

A. No, sir, only from my camp, I saw two men one time, with a boat who stayed there two days; I do not know whether they went outside, or inside again, but when I saw him he was high and dry.

Q. This is the only time you know a lugger attempt to get into the Mississippi river, with oysters? A. Yes, sir.

Q. You would go through Tiger Pass and Main Pass before, when you came back through with a load of oysters?

A. You might have Socola's Canal or the Company's Canal.

Q. Then the oyster boats that did business with New Orleans came up Socola's Pass or Tiger Pass? A. Yes, sir.

Q. Did you ever know a lugger come through Red Pass?

A. No, sir, I never knew them loaded boats coming through Red Pass.

Q. How far are the mouths of Tiger and Red Pass apart?

A. I never measured it, but a mile or a mile and a quarter, not much more; they are close; they are about a quarter of an hour's time in going to them; I do not believe it would take that much time.

Q. Were many luggers bringing oysters from the Gulf, in or near Red Pass? Do they not get a good many oysters from Bayou Jack?

A. Yes, sir.

Q. And where else? A. Bayou Cook, Grand Bayou and other places.

Q. When you get your oysters in Bayou Jack, do you keep coming in that way? A. No, sir, you cannot come in that way.

Cross-examined by Mr. Mellen:

Q. Are not oysters sometimes brought from the east, and planted in the west bay? A. Yes, sir.

Q. By the luggers that come through Cubitt's Gap?

A. Yes, sir, like I said.

Q. They would go over into the west bay, loaded?

A. What do you call west bay?

Q. Tiger Pass, Tonfine Pass and Main Pass, all empty into the west bay?

A. Yes, sir.

Q. And sometimes boats might come there and go over into the west bay.

A. Yes, sir, from Tiger Pass; I went there that day and I had to throw my oysters overboard.

Q. I understood you to say you were trying to get back into Tiger Pass from the west bay, when you got stuck?

A. No, sir, I was going out.

Q. Going which way?

A. Going to the west bay, we were bound from quarantine.

Q. You went over from quarantine station, loaded very often, to west bay; your boats loaded? A. Yes, sir.

Q. What did you do with the oysters there?

A. We bedded them.

Q. When you wanted to bring anything to the city of New Orleans, you took the Socola Canal up towards New Orleans, because it was short?

A. Yes, sir.

Q. Of course, you would not come round about, you would try to come up the river?

A. Well, when we passed the Jump, we never have a full load, but a quarter of a load, or half a load; but when we come to New Orleans, we take a full load.

Q. Do you not know, that for the last—say seven or eight years, since you have known about Red Pass, that the luggers have come with oysters from the quarantine station, through Cubitt's Gap, and down through Red and Tonfine Pass to the west bay?

A. No, sir.

Q. Do you say that they have not?

A. I say I never seen them there.

Q. You never tried to go through there?

A. No, sir, never tried, only with my skiff.

Q. You do not know whether you could have gone through there with a boat?

A. No, sir; not that big boat, no, sir; when I go before it was with my skiff.

Q. Did you have any trouble in going through Tonfine Pass?

A. Well, that is Red Pass blocked seven years ago.

Q. What do you mean by blocked? A. It is blocked by logs.

Q. That is beyond, Tonfine Pass, it has got choked with logs?

A. Yes, sir.

Q. You mean to say that could be opened by floating the logs? A. Yes, sir.

A. [Q.] Nobody stopped it up? A. No, sir.

Q. So you could go as far as Tonfine Pass, and then go through Tonfine Pass? A. Yes, sir.

Q. You never had trouble in going through Tonfine Pass?

A. Yes, sir; where I told you I was stopped.
Q. At the mouths? A. Yes, sir, right at the mouths.
Q. You mean at the outside? A. Yes, sir.
Q. What time of year was that?
A. Well, I do not remember the time of year.
Q. Can you tell about the month? A. Well, it was in winter.
Q. When you were there it was low tide?
A. When I started from my camp, it was five miles out, the tide was rising, and when I got there I was stuck.
Q. What direction was the wind blowing?
A. The wind was about from east by east.
Q. Was the tide high or low?
A. Well, to my knowledge, I believe when I started from my camp, the man that rowed said, the tide must be high when I was there.
Q. You say the tide must be high?
A. Yes, sir, but I do not know now, from my camp, the tide changed when I was going there.
Q. The tide was low when you left home?
A. Well, the tide was an ordinary tide but it was not raised.
Q. It was just on the turn of the tide when you left?
A. Yes, sir, it started to rise and I started to go through, and when I came through I was high and dry with my skiff, drawing six inches of water.
Q. How long does the tide rise there, before it begins to fall again?
A. Well, that depends upon the wind.
Q. Well, usually, how long?
A. Well, something about six or seven hours.
Q. Do you not know as a rule, that it only rises and falls once a day in this section of the country?
A. Well, it will go that way, if we have any breezes, or winds; you may say at 12 o'clock it will fall in the middle of the night; but if the wind shifts around to the southwest, it will rise again; sometimes the tide plays.
Q. But as a rule in ordinary weather, the tide rises in about 12 hours and runs out in about 12 hours?
A. Yes, sir.
Q. How long did it take you to go to that place, five miles?
A. It depends upon the wind.
Q. But this particular time that you refer to?
A. From two and a half hours to three hours.

Q. It took you that long to go five miles? A. Yes, sir.
Q. In a skiff? A. Yes, sir.
Q. Did you row the skiff, or did you have a sail? A. I had a sail, but like I tell you, it went with the wind; I know that day it took me about that time; of course I did not take notice.
Q. Is that the only time you ever tried to go through there?
A. No, sir, I passed there a couple of times, as I told you before.
Q. You did not tell us what happened to you the other two times?
A. Well, I say that every time I passed there, my skiff was dragging.
Q. Every time you got there, you had low water?
A. Well, I had bad luck, it was low water.
Q. Did you have to wait there until the water rose?
A. No, sir, the last time as I tell you a little boy came there and helped me out; if it had not been for him, I would have stayed there.
Q. How often did you go from the river over to west bay?
A. Well, I told you five or six times.
Q. You say you do not know whether any luggers went there, through Red Pass and Tonfine Pass?
A. No, sir, only as I tell you, one time from my camp I saw two men with a boat there, it had two masts, and I do not know whether the man said he was there two days, or not.
Q. Where did you see this boat, with two masts?
A. In Tonfine Pass.
Q. Where were you? A. I was in Bayou Jack.
Q. You say it was in Tonfine Pass? A. Yes sir.
Q. You do not know which direction it came from? A. No, sir.
Q. You do not know whether it came in from west bay, or the other direction? A. No, sir.
Q. But they got away from there? A. Yes, sir, I did not pay attention I do not know how they went.
Q. But they disappeared? A. Yes, sir.
By Mr. Leovy:
Q. There are two ways of taking oysters, one way was to take them over to plant, in small boats, in order to make a natural bed?
A. Yes, sir; and pass through.

Q. I want to ask you if some of the boats did not take oysters from the natural beds and plant them in other places? A. Yes, sir.

Q. They went through these passes with those oysters to plant them?

A. Yes, sir.

Q. Did you take heavy loads when you went through?

A. No, sir, I did not because my boat could not go through.

Q. You did not load up? A. No, sir.

Q. But when you came to New Orleans, you came through the Socola Canal?

A. Yes, sir.

Q. Those boats that went to plant oysters, were not fully loaded?

A. No sir, they took what they could to get through there; when of course, they came to New Orleans, they took a full load.

By Mr. Mellen:

Q. If you wanted to go to New Orleans, you would not come that way, if you could? A. No, sir.

Q. You would go through the Socola Canal, it is shorter? A. Yes, sir.

By the Court:

Q. As it stands, now between this dam, and the place you were to go on the inside of the dam, is there any water now between that and the head of Red Pass?

A. You mean at the dam? Q. Yes.

A. Well, right at the mouth there was, let us see; I cannot recollect but we had the Spanish Pass closed up a couple of years; they had a man that handled the flat boat they put into the Spanish Pass; so when he got there and sun it, it was blocked up and closed; and so they closed the mouth of Red Pass, leaving a little hole there, may be 20 feet more or less.

By Mr. Leovy:

Q. How wide is Red Pass? A. To-day?

Q. Before it was closed A. 25, or 30 feet, more or less, I do not know exactly.

By Mr. Mellen:

Q. Tell us about how wide, by comparison with the distance here in this building; I want to know what you mean by 25 feet?

A. I mean by 25 feet, from here to that door over there, more or less.

Q. It is not as wide as this room (the court room)?

A. It was once, but every time she was filled up, that Jump is inside the river bank, and every year the sand closes them up.

JOHNNIE GIBBS, sworn for the defendants, says:

By Mr. Leovy:

Q. You are in the oyster business? A. Yes, sir.

Q. How long have you been in it? A. About six years.

Q. Do you live down near the Jump? A. Yes, sir.

Q. Have you ever been through Tiger Pass and Red Pass? A. Yes, sir.

Q. Which was the deepest pass? A. Tiger Pass.

Q. Tiger Pass was? A. Yes, sir.

Q. Have you been in Main Pass too? A. Yes, sir.

Q. Have these passes became deeper or shallower during the past 8 or 10 years? A. They are getting shallower.

Q. Was Red Pass closed near the Gulf, or did you have to go through Tonfine Pass? A. Yes, sir, Red Pass is closed.

Q. You had to go through Tonfine Pass? A. Yes, sir.

Q. Have you gone through Tonfine Pass? A. Yes, sir; five times.

Q. In what kind of a boat? A. A boat of one ton.

Q Drawing how much water? A. Drawing about a foot and a half of water.

Q. Did you ever come back through Tonfine Pass? A. Yes, sir.

Q. Did you come back with a load? A. No, sir, light.

Q. Did you have any difficulty in going out and coming in? A. Yes sir.

Q. State to the jury what difficulty you had?

A. I had to work there about three hours.

Q. When; what year? A. I do not know exactly.

Q. Was it five or six years ago? A. Yes sir, 5 or 6 years ago.

Q. Was that going out, or coming in? A. That was coming in.

Q. Well, at other times when you went out and came in,

did you have trouble? A. Yes, sir, I always had trouble in getting through.

Q. In Tonfine Pass? A. Yes, sir.

Q. The luggers that bring oysters to sell in New Orleans, do they ever come through these passes? A. I never seen any.

Q. What passes do they come through? A. I never seen any of them.

Q. Do they come through any canal?

A. Yes, sir, they come through the canal.

Q. What name has the canal? A. The canal is above Socola's.

Q. They come through the Socola Canal? A. Yes, sir.

Q. From what you know of Tonfine Pass, could a boat loaded with oysters come through? A. No, sir, not that I know of.

Q. Did you ever know of any boats loaded, to come through Tonfine Pass and Red Pass? A. No, sir.

Cross-examined by Mr. Mellen:

Q. When you went through Red and Tonfine Pass, were you loaded?

A. No, sir, light.

Q. You had nothing in your yawl? A. No, sir.

Q. You did not have anything? A. No, sir.

Q. Tell me when was the last time you went through?

A. About five or six years ago.

Q. How long before the dam was put there?

A. Well, it was about a year.

Q. About a year? A. Yes, sir.

Q. How many times a year did you go through there?

A. I only passed through there five times.

Q. And you had trouble every time?

A. Yes, sir; every time.

Q. What other places, or what other route did you take?

A. I took Tiger Pass.

Q. Did you have trouble there? A. No, sir.

Q. No trouble at all? A. No, sir.

Q. Where did you have trouble, when you went through Red and Tonfine Pass?

A. I had trouble through Tonfine Pass.

Q. Did you have the trouble in the pass, or outside of it?

A. On the outside of it.

Q. If you had trouble every time, why did you persist in going through there, instead of the other way? A. I thought it was a shorter route for me.

Q. You thought it was a shorter route for you and you kept on trying?

A. Yes, sir.

Q. You never did get by without any trouble? A. No, sir.

Q. What was the state of the tide when you got there?

A. I could not tell you.

Q. Each time that you tried, you thought you were going to succeed in getting through without trouble? A. Yes, sir.

Q. Why should you think that? A. Well, it is so, it is just that way.

Q. You knew that people had gotten through without trouble, and you thought you would go, was not that it? A. No, sir.

Q. Why did you think you could get through without trouble?

A. Just that way, because I thought it was a shorter route.

Q. And that is the reason you thought you would not have any trouble each time? A. Yes, sir.

Q. You say you do not know what the state of the tide was?

A. No, sir.

Q. You succeeded in getting over and getting into West Bay?

A. Yes, sir; and it was mighty hard work.

Q. You did not have any trouble when you were coming from West Bay; you did not have any trouble after you got into Tonfine Pass?

A. No, sir, not inside the pass; there was a little more water there.

Q. What time of year was it?

A. It was in the winter when we run oysters.

Q. The tide is lower in the winter than it is at the other times of the year?

A. I cannot tell you.

Q. How long have you been doing that sort of business, running an oyster boat? A. About six years.

Q. Have you ever seen the water in any other season except the winter?

A. Yes, sir, I see it in the river.

Q. Did you ever see it out there in the Gulf at any other time?

A. No, sir.

Q. How then can you tell whether it was lower, or not in the winter, than at other seasons? A. I could not tell you.

Q. You never noticed it? A. No sir, never noticed it.

Q. You have been in that business, seven or eight years, you say?

A. About six years.

Q. You have been living down there most of the time, on the water, have you not? A. Yes, sir.

Q. Have you been talking to anybody about this case?

A. No, sir.

Q. Never? A. No, sir.

Q. Have you ever told anybody how you were going to testify? A. No, sir.

Q. Did anybody ever ask you how you were going to testify? A. No, sir.

Q. Do you mean to tell me that you came up here, without any one knowing how you were going to testify?

A. I do not understand that, I cannot speak very good; you will have to talk to me in French for me to understand you?

Q. It might be as well to look at me, as in any other direction, you will get your answer from me just as well as from any place else. Do you mean to say that you have come up here, or summoned here, without some one knowing how you were to testify?

A. Of course I was summoned to come here.

Q. Did not somebody know what you knew, and what you were going to testify before you came here? A. No, sir.

Q. I do not mean to say it is wrong for others to know how you are going to testify before you came here?

A. No, sir.

Q. But you are sure that nobody knew, they just summoned you at random?

A. Yes, sir.

By Mr. Leovy:

Q. Was it not generally known that you lived down at the Jump; did not people know that? A. Yes, sir.

Q. Was it not known that you were engaged in this oyster business?

A. Yes, sir.

Q. Was not that the reason they summoned you here, because the people knew that you were engaged in the oyster business? A. Yes, sir.

Adjourned.

New Orleans, La., June 3rd, 1898.

The Court met this day pursuant to adjournment; present his Honor Charles Parlange, Judge, with a jury; and all of counsel present.

Mr. Leovy for the defendants offers in evidence the Map of the State of Louisiana, marked "L," being a map of the State of Louisiana issued by the General Land Office, Department of the Interior.

Subject to Mr. Mellen's objection, heretofore stated.

Mr. Leovy now offers a Survey of the lands embraced in the passes, for the purpose of showing crevasses, made by one Connolly in 1836, under authority. It is offered merely to show the locus in quo, and marked "H."

Mr. Mellen also objects to the offer of the above. The court admitted it under his objection.

Mr. Leovy also offers in evidence the Field Notes, made at the same time 1836, by Connolly, marked "F;" subject to the same objection of Mr. Mellen, which objection is overruled.

Mr. Leovy also offers in evidence, two patents, to show that the land where Red Pass now is, was owned by William Henderson of New Orleans.

THEODORE S. WILKINSON, sworn for the defendants, says:

By Mr. Leovy:

Q. You are living in Louisiana? A. Yes, sir.

Q. Is you residence in the parish of Plaquemine? A. Yes, sir.

Q. How long have you lived in the parish of Plaquemine?

A. I have lived there continuously since 1847, except during an absence of about six years.

Q. You are the Collector of this Port? A. Yes, sir.

Q. Did you not represent your parish in the Congress of the United States for several years? A. Yes, sir; two terms, four years.

Q. Have you interests in plantations on the Mississippi river?

A. Yes, sir; I have large interests.

Q. And have had for a number of years?

A. Yes, sir; at different times for a number of years.

Q. Were you at one time a levee commissioner?

A. Yes, sir; I was a levee commissioner, and also president of the Board. It was the Third District Levee Board, the predecessor of the Lafourche Levee Board, it is the same district; bounded by the Mississippi river by the Lafourche, by the sea; it is now known as the Lafourche Levee Board, the Lafourche Basin; it is triangular in shape. I was at that time president of the Board.

Q. In that capacity, was it not your duty to look after the levees, to prevent the country from crevasses?

A. Yes, sir.

Q. Do you know anything about the Jump, crevasse?

A. It was supposed to have broken before my birth, so I do not know really what year it was; history says it was broken; but otherwise it is known to be a break in the banks of the river; I do not know exactly what year it did break in.

Q. Did you close any part of it?

A. I did not individually. I do not remember whether I was, at the time, a levee commissioner, or not; but I have always been as taking a very active interest in affairs. At my solicitation, and at the earnest request of a large population whom I represented, that one of the passes at the Jump had damaged their property by non-drainage, very much; that they had tried to have it closed, but they had some trouble, I—

Mr. Mellen interposes his objection here.

Witness:—The people were very much interested in having this pass closed above the drainage of the Jump, known as the Spanish Pass, but they had difficulty in getting the money to do it. There was no objection to it by anybody that I heard of, and at my solicitation, as a member of the Board, Colonel Sydney Lewis went down in my company and laid off the levee from Fort Jackson down to the Jump, down a little way alongside the Jump and across this Spanish Pass to the far side of the Spanish Pass, and built a dam in the Jump, known as Spanish Pass, which the people thought allowed the water to pass through and damage them.

By the Court:

Q. In order that the jury may understand it, you are referring now to Spanish Pass, are you not? A. Yes, sir.

Q. Not to this particular pass?

A. No, sir. This Jump is not in the nature of an ordinary stream; it is really a crevasse, a break in the bank of the river, in which the water, flowing from a higher level to a lower level, broke through and carried deposits of sand which filled up here and there and left a number of shifting channels to the sea; by the water flowing through, deposits are built up, and it was therefore the building up of the land that made the passes. It was not in the nature of a stream at all; I do not know how many little streams, estuaries going in all directions, and this particular Spanish Pass, was only a number of these. One of them was named Red Pass. Spanish Pass was stopped up by the State engineer, and nobody ever made an objection to it, on the contrary, the whole community hailed it with delight.

By Mr. Leovy:

Q. Was not that a branch of the Jump, Spanish Pass?

A. Yes, sir; a branch of the Jump.

Q. Is not Red Pass a branch of the Jump? A. Yes, sir.

Q. So Red Pass was exactly like the Spanish Pass?

A. Yes, sir.

Q. It went from the Jump?

A. Yes, sir; a number of these, they were very numerous, one of these very little streams that had deposited, or built up by the mud in the river on each side.

Q. What would be the effect of opening Spanish Pass?

The Court:—Let me inquire what we have to do with Spanish Pass?

Mr. Leovy:—It is part of the Jump, this Spanish Pass, and the mode of closing it is practically the same as Red Pass. It is the system adopted for the protection of the country. I have contended all along, that the Police Jury has the power of closing all these passes, and what has been done to Spanish Pass, is what they have done to Red Pass.

The Court:—As I understand it, it is charged that Red Pass was a navigable water of the United States, and that these defendants have dammed it?

Mr. Leovy:—Yes.

The Court:—Then how does it assist us to inquire about

the closing of Spanish Pass, these defendants are not accused of closing that.

Mr. Leovy:—Your Honor will see the course we are pursuing, it is logically and directly relevant. One of our defenses is, that this is not a violation of the Act of Congress, because it is the exercise of the police power of the State, and that it was absolutely necessary for the protection of the people down there. We will show that the Police Jury is now doing, precisely what it did before in the exercise of its police power. In that connection I have brought the two things together; they are both the same; Spanish Pass on its closing did not fully secure the result contemplated by the Act of Congress of 1849, which authorized the Police Jury to do this very thing, to secure the full result.

By Mr. Leovy:

Q. I ask you, as an old citizen of Louisiana, having held high positions and having been the owner of plantations, what would be the effect on the prosperity of the State of Louisiana, if the State were without the power to close crevasses?

Mr. Mellen for the Government objects.

A. It would make it uninhabitable; the statement would be preposterous, if they had not the right to close it.

Q What would be the effect upon the State if, in the construction of new levees for the first time it was forbidden to close existing breaks in the banks?

A. Well, it would make the new levees entirely useless.

Q. If levees were constructed in front of the river to protect the land and a portion is left open, like Spanish Pass, or Red Pass, by which the water extended over the land behind, is the levee of any use at all, if the water is permitted to go through behind the levee by way of one of these passes?

A. I would answer that by saying it was useless; it would be impaired if not nearly destroyed. There is a case in point. There is a little Levee Board on the left bank called the Lake Borgne Levee Board, whose district runs up to Bohemia, and some of the levees, just below the limits of the district were washed away last year. This Levee Board, in order to protect itself, contributed from among themselves to the building of the levees, beyond and outside of its own district.

Q. Have not these levees been built since 1890, some of them?

A. I forget the year in which the levee below Fort Jackson was built, it was within that time, but I do not know when.

Q. I ask you this question, have not the levee board been building levees and closing crevasses, since 1890?

A. Not only since then, but long before.

Cross-examined by Mr. Mellen:

Q. You say you do not recollect when Spanish Pass was closed?

A. I think it was a number of years ago.

Q. My recollection of the testimony of Mr. Lewis, the engineer, was, that it was closed in 1888?

A. I expect Mr. Lewis closed it.

Q. He testified on the subject?

A. Well, his testimony—it was in that vicinity; it is not from 1890 one way or the other.

Q. How long have you had levees down there at the Jump?

A. I think there was some private levee, a small one, but no public levee until Lewis went down in my company and laid that levee and closed this pass.

Q. That is the first time there was a public levee down there?

A. That was the first time.

JACK STULICH, sworn for the defendants, says:

By Mr. Leovy:

Q. Where do you live? A. I live at the Home Place.

Q. Did you ever live near the Jump? A. Yes, sir; I did.

Q. When? A. I lived at Buras about five years.

Q. Buras is at the Jump? A. Yes, sir.

Q. You lived there five years ago? A. Yes, sir.

Q. Before that, what was your business?

A. I used to work in the willows, trapping and catching catfish and a little of everything.

Q. Did you have to go through Red Pass and Spanish Pass?

A. No, sir; not Spanish Pass.

Q. I mean Red Pass, Tiger Pass and the other passes?

A. Yes, sir.

Q. Did you go through Tonfine Pass. A. Yes, sir.

Q. Did you have a boat of your own? A. Yes, sir; I had.

Q. Had you a boat of your own five years ago, when you used to go down there?

A. No, sir; I had a small pulling skiff, then I bought myself a boat.

Q. How many years were you in that business?

A. Trapping you mean?

Q. Yes? A. I suppose about 10 or 12 years.

Q. Did you ever go through Red Pass and Tonfine Pass?

A. Tonfine Pass, yes, sir; I did.

Q. How often? A. Well not often, about 5 or 6 times, may be.

Q. Was that five or six years ago?

A. No, sir; when I passed there the last time it was about three or four years ago.

Q. Was that before they put the dam in Red Pass?

A. Yes, sir; before that.

Q. How was the water in Tonfine Pass?

A. In Tonfine Pass in low tide, it was pretty nearly all dry; I passed there in about four inches of water.

Q. Was that at the mouth of the pass? A. No, sir; outside in the bay.

Q. After you got out of Tonfine Pass? A. Yes, sir.

Q. Could you get to the Gulf without passing over there? A. No, sir.

Q. What was the deepest water that you saw there?

A. The deepest water was about a foot and a half.

Q. How much did your boat draw; was it a skiff?

A. Yes, sir; my boat drew about a foot of water, light.

Q. Did you go there without any trouble?

A. No, sir; I had trouble every time I passed there.

By the Court:

Q. Where was it that you had trouble?

A. On the bar, what we call the bar, outside.

Q. But after you got into Tonfine Pass, would you have any trouble there?

A. No, sir.

Q. You had no trouble there? A. No, sir.

By Mr. Leovy:

Q. Is not that the bar at the mouth of Tonfine Pass that you speak of?

A. Yes, sir.

Q. Could you go from Tonfine Pass into the Gulf without passing over it?

A. No, sir.

Q. Were there any other way of getting into the Gulf?

A. No, sir; not that I know of.

Q. When you attempted to get there you got stuck?

A. Yes, sir.

Q. How wide is Tonfine Pass?

A. Tonfine Pass is about an arpent, more or less.

Q. What was its width about midway? A. Well, it is about the same.

Q. An arpent? A. Yes, sir; about that.

Q. Was it all the same width? A. About.

Q. About how deep was the water in Tonfine Pass?

A. Well, I do not know that, you mean inside?

Q. Yes, inside the pass?

A. I guess some places two feet and some places three feet, and more.

Q. But some places it was two feet? A. Yes, sir.

Q. You spoke of a bar at the mouth of the pass; what do you mean by the mouth of the pass? A. The mouth of the pass?

Q. Yes. A. Well, it is not that much.

Q. How deep is it?

A. From a foot and a half to two feet, at the mouth; I never measured it, I am not sure of it.

Q. How far have you to go from the mouth of Tonfine Pass until you get into six feet of water? A. I guess about an acre, or two acres.

Q. Until you get six feet of water?

A. Well, I cannot say whether it is six feet or not; I am not sure of it, I never measured it.

Q. How wide is that bar; that low land in the bay?

A. That is a thing I do not know.

Cross-examined by Mr. Mellen:

Q. You say it was two feet deep in Tonfine Pass, you mean at low water, do you not? A. Yes, sir; well, that I am not sure of, because I did not pass there in four years.

Q. You did not measure it, you found you could go through all right, and you did not measure it? A. No, sir.

Q. You had no trouble going through? A. No, sir; only at the bar.

Q. Except outside at the mouth? A. Yes, sir.

Q. Is it all the same depth outside the mouth; is there not some part outside at that mouth, deeper than at other parts? A. That I do not know.

Q. You are not very familiar with it, you never examined it very closely?

A. No, sir.

Q. You have never tried to go through there in a larger boat?

A. No, sir.

Q. Do you not know that four or five years ago, when you used to go through there, that luggers used to go through?

A. Yes, sir; I saw some boats go through.

Q. You saw luggers going through? A. Yes, sir.

Q. Did they go through loaded with oysters, brought from the east?

A. I never saw any.

Q. What were they going through with?

A. I saw them going through very light, that is the only way I saw luggers going through there.

Q. You saw them going through, light? A. Yes, sir.

Q. How did they come back?

A. Well, you know some of them came from New Orleans.

Q. No, but when they came back, did they come back light?

A. Well, they passed once or twice while I was there, either from the river, out.

Q. From the river out to West Bay? A. Yes, sir.

Q. When they came back, did they come back light?

A. That I do not know.

Q. How do you know they were light, that they had nothing in them?

A. Because I saw them, I could not swear that they were right empty, but they seemed to be light.

Q. You do not know whether they had freight in them, or not?

A. Well, there might have been a little freight, I do not know.

Q. Did you ever see any going through there with lumber on it.

A. No, sir; I do not know.

Q. But you did see them a number of times going through; that is these luggers? A. Yes, sir.

By Mr. Leovy:

Q. You were asked how do you know these boats were light; is it not possible for a person fairly familiar with luggers to tell from their height over the water, whether they are loaded?

A. Yes, sir.

By Mr. Mellen:

Q. But you can tell, from looking at a boat, whether it is absolutely empty, or not, can you? A. No, sir.

By Mr. Leovy:

Q. Can you not make an approximation of what a boat is drawing; can you not come near to what a boat is drawing by looking at her from the outside? A. No, sir.

Q. How much do these luggers draw, when they are empty?

A. That is a thing I do not know.

FRED TOURNEY, sworn for the defendants, says:

By Mr. Leovy:

Q. Where do you live? A. 468 Jackson avenue.

Q. What is your profession? A. A physician.

Q. How long have you been a physician? A. Since 1894.

Q. Are you a graduate of any college? A. Tulane University.

Q. Have you ever passed through Red Pass or Tonfine Pass in the parish of Plaquemine? A. Yes, sir.

Q. Out into the Gulf? A. Out into the Gulf.

Q. In what kind of a boat?

A. We had a scow with sails on it, a flat bottom scow.

Q. Drawing how much?

A. With all our trunks and things on board, I guess we were drawing 8 or 10 inches; I guess that is about the way it was loaded.

Q. Did you have any difficulty in getting from the mouth of Tonfine Pass into the Gulf? A. Yes, sir.

Q. State how much.

A. I kept a log of this, but you will have to take it as close as I can remember.

Q. Made by you at the time?

A. Yes, sir; I had a log of it and tried to find the little book, but could not find it and hunted all day for it, so I will do the best I can. On that trip, there was Dr. Abby

and myself, and we made it a point to go into that country and eat oysters and fish and hunt. We were on a pleasure trip. We left Buras with this boat, I think the boat belongs to Mr. DeArmas, a pretty good size flat boat and it drew very little water. We had a heap of trouble; we got into this place, if I remember distinctly, on the evening of the first day, and we lay at the source of this Tonfine Pass alongside of a tugboat, a small launch that was going round to Pensacola. And the next morning we started down this pass and had one or two little minor accidents, one thing or another, and in the evening we came to the mouth of that pass, and there we were nearly all the time so good and dry; there was very little water at the place; but to get out, ambitious as we were to make the place, we had to put out anchors and get big ropes, and everybody went to pulling on the windlass, and we tried to get over with that; we worked that late, and got exhausted, got tired, and the weather was right cold. And the next day we lay there, and if I am not mistaken, that evening we got off, but we worked both with the anchors and the windlass and pulled over this place.

Q. Do you own any land in the parish of Plaquemine; have you any interests down there? A. No, sir.

Q. Are you acquainted with the defendant, Robert S. Leovy?

A. I did not know him until I was introduced to him a few days ago.

Q. There was your boat, I think you said, drawing from 8 to 12 inches of water?

A. I think so, we took a big lot of plunder with us on this trip.

Q. About how wide is that pass?

A. That pass is from—it runs up and opens up the prairie, the grass grows on the side of it; I suppose that flat must be 150 yards wide, at least.

Q. At the mouth? A. Yes, sir.

Q. But after you got up into the pass, how wide?

A. Well, in some place the width would be twice the width of the boat.

Q. How wide was that boat?

A. I guess the boat was 8 or 10 feet wide.

Cross-examined by Mr. Mellen:

Q. You mean to say, that in some places in Tonfine Pass it is only about 15 or 20 feet wide, from bank to bank?

A. I mean from bank to bank—there is one place I remember, where the boy fell overboard with a charcoal box; he slipped from the deck by the sail coming over; in some places it was twice the width of the street out here.

Q. And you say in some places it was 15 or 20 feet wide?

A. No sir; I did not say that, it may be wider, but we first rushed on with a sail, on it across, and we were not very far from either shore.

Q. Then you had the boom out crosswise of the boat?

A. Yes, sir; across over.

Q. It extended over a certain distance? A. Yes, sir.

Q. When was that?

A. That was, as close as I can remember, the year after we had that big storm, that must have been in 1894.

Q. What time in 1894?

A. Well, at New Years' Day we were in there if I am not mistaken; I think we were there New Year's Day, because I remember we had burned about six or eight sacks of charcoal, and we were cold that day.

Q. You kept a log of that?

A. Yes, sir; I did, of every little accident..

Q. I suppose you did that for amusement? A. Yes, sir.

Q. Did you keep a record of how the wind was blowing?

A. No, sir; I did not.

Q. Do you recollect how the wind was blowing?

A. Now, you have got me, I do not remember; I know we tacked for half the night to make about five miles, from there up.

Q. Do you not recollect whether the wind was blowing from south or north?

A. Directly, I cannot say, I could not answer that, I was not paying attention to it.

Q. You say it was a very cold day?

A. Yes, sir; we had ice there; we had to use the ashes from the fire to keep from slipping.

Q. The probability is, the wind was blowing from the north? A. Yes, sir.

Q. How was the condition of the tide, was it low, or high?

A. It seemed to be low, it seemed to be a low tide, to me.

Q. You are somewhat familiar, are you not, with the causes of the rise and fall of the tide in these waters?

A. To some extent.

Q. It is due, largely, is it not, to the direction and strength of the wind?

A. Yes, sir.

Q. When the wind blows continuously from the north and northeast, the tides are apt to continue low, are they not?

A. Yes, sir; in different localities.

Q. But in all of that locality, is it not the fact?

A. Yes, sir.

Q. Now, all the time you were there, the wind was blowing from a northerly direction, I presume; it was cold you say, all the time?

A. Yes, sir.

Q. Now, was the wind blowing hard?

A. Not the day we came in there, because if the wind had been very heavy we would have been able to help ourselves along, with the sails, but we had no sails up, with the windlass.

Q. That is the day you went in? A. No, sir; the way we went out.

Q. I thought you came from West Bay into Tonfine Pass?

A. West Bay? We left Buras Settlement, and went in there.

Q. How was the wind blowing when you first went down there, that you say you had trouble?

A. We had a good wind going down there, so that could not have been a northerly wind, because that pass runs towards the west.

Q. Does not Tonfine Pass run somewhat of southwest?

A. No, sir; I do not think.

Q. You do not think so?

A. No, sir; because here is the Jump; the Jump is on the right side of the river, and you come into that pass and run down in that direction.

Q. Now, when you go into Red Pass from the Jump, you strike Tonfine Pass on the left bank? A. On the right bank.

Q. On the right bank? A. Yes, sir.

Q. You strike Tonfine Pass on the right bank?

A. Yes, sir; going out.

Q. Going out to West Bay? A. Yes, sir.

Q. Then what way did you go, go north?

A. No, sir; it was about southwest.

Q. It goes about southwest? A. Yes, sir.

Q. Now, if you go into Tonfine Pass on the right bank going out, you went southwest, you would come back into Red Pass, would you not?

A. Go out?

Q. You say Tonfine Pass is on the right bank of Red Pass; now, if you went down into Red Pass and turned into Tonfine Pass on the right bank, and then turned southwest after that, would not that bring you right back into Red Pass? A. If we turned around and came back.

Q. I understood you to say, when I asked you if you went north, if you turned north, if you continued to the north, and I understood you to say no, you turned and came south?

A. As I say we went in there and turned to the right into this pass, whatever you call it, Tonfine Pass; it was the first pass we came to after we came from the river.

Q. That is Red Pass; after you came down from the Jump and went into the pass, that was Red Pass?

A. Yes, sir.

Q. After you came down that pass for a considerable distance, what did you come to; the West Bay? A. I do not know.

Q. You do not know whether you left that pass and went into another one, or not?

A. No, sir; I think we kept the smaller pass of the two; they told me it was Tonfine Pass.

Q. Then you went southwest? A. Yes, sir.

Q. Then the north wind would be favorable?

A. Yes, sir; we had a pretty fair wind going out there.

Q. And the wind was blowing pretty briskly then?

A. Yes, sir.

Q. And when you reached down there, it did not take you some hours to do it?

A. Yes, sir; it took us fully two or three hours.

Q. When you reached there, you found the water in the West Bay very low?

A. Yes, sir.

By the Court:

Q. Until you reached the flats out there, did you have any trouble with the water? A. No, sir.

By Mr. Mellen:

Q. Is that the only time you ever went through there?

A. That is the first and only time; the next time that we

made up a trip, we went out on a larger boat; I opposed going in there altogether and would not go with the party if we went in there, on account of the awful work we had; so we went in at another pass and came round.

Q. What boat was that that you were on?

A. This was the same boat.

Q. Has it any name?

A. I know it was a registered boat, it was in the oyster trade, she did not have a name.

Q. You say she is a registered boat?

A. Well, they have to be registered, I think, if they use them for oysters.

Q. Do you know what her tonnage was; 4, 5 or 6 tons?

A. No, sir; I do not, I guess they rate them up.

Q. You do not recollect what the name of the boat was?

A. I do not recollect; it is a good while ago; and I have forgotten these little things about it.

Q. You do not recollect the name?

A. No, sir; I do not recollect the name, but I know it was Joe Massey's boat.

Defendants close their case.

Mr. Mellen offers in evidence extracts from a certain book, being the testimony of E. L. Corthell, Civil Engineer, contained in the opinion of the Supreme Court in the case of the State versus Buck & Fruit Co., 46 Annual, pages 673, 674, 675 and part of 676.

And the government closes its case.

The trial Judge makes the following general charge a part of Bills of Exceptions Nos. 2 and 3.

Nunc pro tunc as of June 6, 1898.

(Signed) CHARLES PARLANGE,
U. S. Judge.

United States Circuit Court, Eastern District of Louisiana.

The United States :
vs. : No. 2245.
Augustus F. Leovy and Robert S. Leovy. :

New Orleans, La., June 6th, 1898.

The Court met this day pursuant to adjournment. Pres-

ent, his Honor, Charles Parlange, Judge, with a jury, and all of counsel present.

And his Honor now proceeded to charge the jury orally, as follows:

Gentlemen of the Jury:

The hearing of this case has consumed considerable time, but it is, so far as you are concerned, a simple matter. The main, if not the only question for you to decide is, whether Red Pass was a navigable stream of the United States. I will say to you at the outset, that you are the sole judges of the facts and of the credibility of the witnesses. I am sole judge of the law; you must take the law as I give it to you. I have a right to review the facts, and even to express an opinion upon them, but I say to you very distinctly, that if I do so, any expression of opinion of mine, on any matter of fact, is in no manner binding upon you.

That being the case, I will call your attention first to the fact, that there are two defendants in this case. One is Mr. Augustus F. Leovy, and the other is Mr. Robert S. Leovy. Of course, it is for you to decide, whether both are, or either of these two defendants, is guilty. It may be, that one is guilty and the other not. Of course, you cannot find both guilty, unless you are satisfied of the guilt of both, beyond a reasonable doubt, and that matter is all for you. But I say to you, that so far as Mr. Augustus F. Leovy is concerned, it does not appear to me, that the Government has made out such a case, as would warrant you in finding him guilty. That, however, is a matter entirely for you to pass upon. As to Mr. Robert S. Leovy, it is admitted that he dammed Red Pass. The statement was made to you by his attorney, Mr. Leovy, that he dammed the pass. Of course, that statement is made in connection with the plea, or defense, that he did it under the authority of the Police Jury of the parish.

I wish to say to you gentlemen, that the punishment in this case, is a matter with which you have no concern. Mr. Leovy, the attorney in addressing you at the opening of his address, said to you, that the liberty of these defendants was involved; and, also, towards the close of his address, he said to you, that they were charged with crime, and I wish to state, that this offence is called by the Act of Congress, a misdemeanor, the punishment for which is left to the discretion of the Judge; this punishment may be a fine of one cent, up to $5000; or it may be imprisonment up to

one year in an ordinary jail. But I say to you, that with the punishment you have absolutely nothing to do. All that you are asked is, whether these defendants are, or either one of them, is guilty. If you find them guilty, then the responsibility of any subsequent action, rests upon me, not upon you.

I wish also to say, that the question, whether some 60 years ago, the Jump resulted from the enlargement of some canal, which was then in existence, or, as has been contended here, was a crevasse in that sense of the word, you are not to consider at all. As you have been appealed to in the argument, to consider that this question involved the right of the State to close a gap in its levees, I say, that you have nothing of that sort to consider. I repeat to you, that whether or not, 63 years ago, the Jump was formed, in the manner in which it was contended it was, is not a matter for your consideration. I charge you furthermore, that you are not to be influenced in this case, by what the result of the opening of this dam may be. Mr. Leovy, in his opening to you, before he introduced his evidence, said to you, that you would be trying at the same time the question of the guilt of these defendants, and also whether that dam should be opened. The sole question that you have to deal with here is, whether these defendants are, or either one of them, is guilty. With the consequences, you have absolutely nothing to do.

I charge you, gentlemen, that the Police Jury of the parish had no right to authorize Mr. Robert S. Leovy to dam Red Pass, if Red Pass was a navigable water of the United States. I say that it had no authority, because, in the year 1890, the Congress of the United States passed the law under which this indictment has been brought, forbidding the damming of any navigable stream of the United States, without the previous authorization of the Secretary of War. Therefore, as it is not contended, in this case, that there was any authority from the Secretary, but on the contrary there is proof tending to show there was no such authority, then it results, that it is no defense for Mr. Robert S. Leovy to show his pretended, or alleged authority from the Police Jury of the parish of Plaquemine. The Police Jury of the parish of Plaquemine could not legally have dammed it, and therefore Mr. Leovy could not.

Now then, as I said to you at the outset, the only question for you to decide is—under the admission, that Robert S. Leovy dammed this pass, and assuming that you will

agree with me, that there is not sufficient evidence to convict Mr. Augustus F. Leovy—I say to you, that the sole question for you to decide is, whether Red Pass, at the time Mr. Robert S. Leovy dammed it was a navigable water of the United States.

What is a navigable water of the United States? It is a navigable water, which, either of itself, or by connection with other water, permits a continuous journey to another State. If a stream is navigable, and from that stream you can make a journey by water, by boat, by one of the principal methods used in ordinary commerce to another State, from the State in which you start upon your journey, then, that is a navigable water of the United States. It is so called, in contradistinction to waters which arise and come to an end within the borders of a State. Suppose you had two lakes within the State, with a little river connecting these two lakes, both the two lakes and the little river being within the confines of one and the same State, these waters would not be navigable waters of the United States, whether they were navigable or not, for the reason, that you could not, from any point on these waters, travel continuously by water to another State of the Union. But if from the water in one State (as I said before and repeat, because it is important) you can travel by water continuously to another State, and the water is a navigable water, then it is a navigable stream of the United States.

Now then what is a navigable river? A navigable river is a river which is navigable in fact, a river which affords a channel for useful commerce. One of the witnesses for the defendants stated to you his idea of a navigable stream to be a stream that permitted large steam vessels to navigate. That is not the idea of the law. If the stream will bear any vessel which is used in ordinary commerce, then it is a navigable stream. Therefore the question is, was Red Pass navigable? Was it a navigable water of the United States? If it was navigable and connected with waters that permitted a journey to another State, then it is a navigable water of the United States. And in this case, if it was navigable, it would be a navigable water of the United States, or might be so in two ways;—by connecting with the waters of the Gulf, if you should find it connected that way, or by connecting with the water of the Mississippi. I mean to say, that if there is evidence here, that you could leave the Mississippi river and go into the Jump and then go to the place where this dam was built by Mr. Robert S. Leovy, and

some distance beyond that, and that it was navigable for boats or vessels carrying on commerce, then it would be a navigable water of the United States, because it would connect with the Mississippi, and from the Mississippi you could go to other States of the Union.

I say again, that it might connect in another way. It might connect through the Gulf. But the fact that I wish to impress upon you is this:—that it is not absolutely necessary that you should find that there was navigability all the way from the Jump out to the Gulf, because, if from some point beyond the place where Mr. Robert S. Leovy built this dam, towards the Mississippi river, the stream was navigable, then, it would be a navigable stream of the United States, because it would connect with the Mississippi river. I hope I make myself plain.

Then, as to whether this stream was navigable, you have all the evidence before you, which I have no doubt will enable you without any difficulty to reach a conclusion as to what the condition of the water was, at the place of the dam. You have had the evidence of John Collett, which is for you to consider. He said, as I understand it, that he came back as they were closing, and Mr. Leovy said to him, "you are just in time;" that some of the men were up to their arm-pits in the water. I asked this witness whether there was any trouble in Tonfine Pass and my recollection is that they had no trouble in Tonfine Pass, but the contention was, that after you got out of Tonfine Pass, at low water, there was sometimes great difficulty. Now, so far as that is concerned, that there would be some difficulty in getting out of the stream, at its mouth, in low water, would not necessarily mean, that the stream was not navigable. There are many rivers and harbors having bars, where vessels have to wait until they can get over such bars. So I repeat to you, if you consider the case from that standpoint, that Red Pass was a navigable water of the United States, because it would connect with waters of the Gulf of Mexico, you are to bear in mind the fact, that although there may have been difficulty at the mouth of Tonfine Pass at low water, it would not necessarily mean that Tonfine Pass was not navigable. You have before you the maps of the United States, introduced in evidence by the defendants themselves, which show, that at low mean tide there are two feet of water there, which means necessarily, that at high tide, there are more than two feet.

All of these things you are to take into consideration.

You have the testimony, as I remember, of men who say they have gone through there. If Tonfine Pass and Red Pass are available for commerce and navigation by means of luggers and oyster boats for the purpose of useful commerce, it would be a navigable stream; and if you find, that it connected with other waters over which a continuous journey could be made to other States, then it would be a navigable water of the United States.

I repeat to you, that under my view of the case, all you have to decide is, whether Red Pass was a navigable water of the United States, and as you decide that, the case will go, because, it is conceded, that Mr. Leovy dammed it.

LETTER OF THE SECRETARY OF WAR, DATED MAY 11th, 1898, ADDRESSED TO MR. J. WARD GURLEY, UNITED STATES ATTORNEY, EASTERN DISTRICT OF LOUISIANA.

Offered by U. S. and filed June 1, 1898; referred to in Stenographic Report of Testimony, made part of Bill of Exception No. 2.

United States (Vignette) of America, War Department.

Washington City, May 12, 1898.

I hereby certify that the paper hereto attached is a true copy of a letter of record in the office of the Chief of Engineers, U. S. Army.

(Signed) JOHN M. WILSON,
Brig. Gen., Chief of Engineers, U. S. Army.

Be it known, That John M. Wilson, who signed the foregoing certificate, is the Chief of Engineers, United States Army, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof I have hereunto set my hand, and caused the seal of the War Department to be affixed, on this 12th day of May, one thousand eight hundred and ninety-eight.

[Seal] (Signed) R. A. ALGER,
Secretary of War.

War Department.

Washington, May 12, 1898.

Sir:

Referring to your letter of the 5th instant, I have the honor to advise you that, after diligent search of the records of the Department, I find that no permission has been granted by the Department to Augustus S. Leovy and Robert S. Leovy, of Plaquemine parish, La., nor to any other person or persons, to build a dam in and across the navigable stream of the United States known as Red Pass.

I have to advise you further that no harbor lines have been established by the Department in that locality.

Very respectfully,

(Signed) R. A. ALGER,
Secretary of War.

Mr. J. Ward Gurley, U. S. Attorney, Eastern District of Louisiana, Customhouse Building, New Orleans, La.

A CERTAIN MAP ISSUED BY GENERAL LAND OFFICE AT WASHINGTON, BEING MAP OF THAT PORTION OF COUNTRY, DULY CERTIFIED AS THE STATE OF LOUISIANA.

Offered by defendants, and referred to in Stenographic Report of Testimony.

Note—The above offer withdrawn.

GENERAL CHART OF THE COAST, SHOWING THE APPROACHES TO THE MISSISSIPPI RIVER, MOBILE BAY, AND THE ATCHAFALAYA BAY; ALSO SHOWING THE SOUNDINGS OF THE PASSES.

Offered by defendants, referred to in Stenographic Report of Testimony; made part of Bill of Exceptions No. 2.

Note—The foregoing Chart is to be transmitted along with this Transcript, in the original.

MAP OF THE SAME CHARACTER, EXCEPT THAT IT IS LARGER AND SHOWS MORE DISTINCTLY, THE PASSES, BEING MARKED COAST CHART NO. 194 OF THE MISSISSIPPI RIVER, FROM THE PASSES TO GRAND PRAIRIE.

Offered by defendants; referred to in the Stenographic Report of the Testimony, made part of Bill of Exception No. 2.

Note—The above Map is to be transmitted, in the original, along with this Transcript.

RESOLUTION

Adopted by the Police Jury of the Parish of Plaquemine authorizing the closing of Red Pass, dated July 1, 1890, and marked Exhibit "A"—

Offered by defendants, filed June 2, 1898, referred to in Stenographic Report of Testimony, made part of Bill of Exception No. 2.

Extract from Minutes of Police Jury of the Parish of Plaquemine, Dated July 1st, 1890.

On motion of Mr. Schoenberger, duly seconded, that the Syndic of the 5th ward be authorized to have Red Pass closed, provided property owners are favorable to the closing of said pass and pay all costs on said work.

(Signed) JOHN DYMOND,
President P. J.

(Signed)
F. C. MEYERS, Secty.

A true copy:

(Signed) JOS. SAVAIL,
Secretary of Police Jury.

ADVERTISEMENT IN NEWSPAPER PROTECTOR, OF OCTOBER 26th, 1895, STATING THAT MR. ROBERT S. LEOVY WAS SYNDIC, ETC., OFFERED ON BEHALF OF DEFENDANTS, MARKED "B"—FILED JUNE 2, 1898; REFERRED TO IN THE STENOGRAPHIC REPORT OF THE TESTIMONY, FILED WITH BILL OF EXCEPTION NO. 2.

Notice.

I do hereby appoint in my stead R. S. Leovy as syndic of the 5th ward, to serve without pay as per ordinance of the police jury.

GEO. SCHOENBERGER.

RESOLUTION OF THE POLICE JURY OF THE PARISH OF PLAQUEMINE, BEING AN EXTRACT FROM THE MINUTES OF ITS PROCEEDINGS, DATED FEBRUARY 8TH, 1898, MARKED "C."

Offered by Defendants, filed June 2nd, 1898; referred to in the Stenographic Report of the Testimony, made part of Bill of Exception No. 2.

Extract from the Minutes of the Police Jury of the Parish of Plaquemines, meeting held, Febry. 8th, 1898.

By Mr. Perez:

Whereas the Police Jury of the Parish of Plaquemines adopted a resolution on July 1st, 1890, authorizing and directing the closing of Red Pass, a part of the Jump, an old crevasse of the Mississippi River, and pursuant thereto Robert S. Leovy, the Syndic of the Fifth Ward of said Parish did close the same, and the closing thereof has reclaimed large tracts of worthless sea-marsh and made it valuable and taxable land, and by drainage has improved the health of the District and improved all the land near the Mississippi front; and

Whereas since the closing of said Red Pass great improvements have been made on the land adjoining the Pass and many orchards have been built up which will be damaged by the opening of Red Pass; and

Whereas the Levee Board of this District has made the new bank a part of the Levee District by resolution passed November 20th, 1897, and protested against the opening of Red Pass;

Be it resolved, That this Board hereby ratifies and approves the act of said Robert S. Leovy, Syndic, in closing said Red Pass and unites with the Buras Levee Board in protesting against the opening thereof, and requests the Attorney of the Board to take such steps as in his judgment may be necessary to prevent said Pass from being opened.

(Signed) GEO. SCHOENBERGER,
(Signed) JOS. SAVOIE, President.
Secretary.

MAP OF THE STATE OF LOUISIANA, MARKED "L," BEING A MAP OF THE STATE OF LOUISIANA ISSUED BY THE GENERAL LAND OFFICE, DEPARTMENT OF THE INTERIOR.

Offered by Defendants and filed June 2, 1898; referred to in the Stenographic Report of the Testimony, made part of Bill of Exception No. 2.

Note—Map, marked "L," to be transmitted, in the original, along with this Transcript.

SURVEY OF THE LANDS EMBRACED IN THE PASSES, FOR THE PURPOSE OF SHOWING CREVASSES, MADE BY ONE CONNOLLY IN 1836, UNDER AUTHORITY. OFFERED MERELY TO SHOW LOCUS IN QUO, AND MARKED "H."

Offered by Defendants, filed June 2, 1898; referred to in the Stenographic Report of the Testimony, made part of Bill of Exception No. 2.

Note—Survey, marked "H," to be transmitted, in the original, along with this Transcript.

FIELD NOTES, MADE IN 1836, BY CONNOLLY, MARKED "F."

Offered by Defendants, referred to in the Stenographic Report of the Testimony, made part of Bill of Exception No. 2.

Field Notes of G. F. Connelly, U. S. Dep. Surveyor, of Surveys made in South Eastern Dist. La. in 1836.

Variation 9 deg. East. T. 21 S. R. 31 E.

Section 4.

Beginning at the lower front Corner Sec. 3. Thence S. 32 E. 26.00. To the lower front corner Sec. 4. Whence Willow 10 in dia. S. 21 E. 27 L. Willow 7 in dia. N. 47 W. 18 L.

South thence between Secs. 4 and 5.

23.00 Came to impassable sea marsh saw the Bay about 20.00 chs. distant.

Section 5.

From the lower front corner of Sec. 4. Thence S. 32 E. 26.00 to the lower front corner of Sec. 5.

Whence a Willow 10 in dia. N. 24 W. 115 Lks. Thence South between Secs. 5 and 6 through Prarie.

17.00 Came to impassable Sea Marsh saw the Bay about 30 chs. South.

Section 6.

Field Notes Cont. Beginning at the lower front Corner Sec. 5. Thence S. 38 deg. E. 22.00. To lower front corner Sec. 6. Whence a Willow 10 in dia. N. 37 W. 62 L. Cypress 18 in dia. S. 12 E. 60 L.

Thence South between Secs. 6 and 7.

12.00 Came to Sea Marsh, saw the Bay about 10.00 South S. 38' E.

Section 7.

Beginning at the lower front Cor. of Sec. 6. Thence 20.50 To a canal.

22.50 to the lower front Corner of Sec. 7. Whence a Willow 4 in. dia. S. 44' E. 116 Lks. Thence South between Secs. 7 and 8.

4.00 to Marsh saw the Bay about 3.00 chs. Dist. The above canal is called Gilbert's Canal, it is 4 feet deep 12 feet wide and 450 lks. in length.

It forms a communication Bet. West Bay and the Mississippi River and was dug by Gilbert for the purpose of obtaining oysters.

Field Notes Cont.

Section 8.

Beginning at the lower front corner of Sec. 7. and Run S. 43' E. 20.00 to the lower front Corner (Mound & Post). Between Secs. 8 and 9. South 5.00 to Sea Marsh.

Section 9.

From the lower front Corner of Sec. 8. S. 45 E. 19.50 to the lower front Corner of Sec. 9, raised a mound and post, Thence Bet. Secs. 9 and 10. South 6.00 to Impassable Sea Marsh.

Surveyor's General Office,
New Orleans, 12th Dec. 1889.

A true extract from the approved field notes of G. F. Connelly, D. S. 1836.

(Signed) CALHOUN FLUKER.
(Seal) Surveyor General La.

Surveyor General's Office,
New Orleans, La., Oct. 18th, 1893.

I hereby certify the foregoing to be a true and correct Copy from a document this day presented to me by Mr. Henry Leovy.

(Seal) (Signed) CHAS. H. DICKINSON,
Surveyor General, La.

TESTIMONY OF E. L. CORTHELL, CIVIL ENGINEER, CONTAINED IN THE OPINION OF THE SUPREME COURT IN THE CASE OF THE STATE VERSUS BUCK & FRUIT CO., 46 ANNUAL PAGES 673, 674, 675 AND PART OF 676.

Offered by the United States, referred to in the Stenographic Report of the Testimony, made part of Bill of Exception No. 2.

Note—The testimony of E. L. Corthell, Civil Engin-

cer, contained in the opinion of the Supreme Court, in the case of the State versus Buck & Fruit Co., 46 Annual, pages 673, et seq., to be found in the printed bound volume, and to be read therefrom.

United States Circuit Court, Eastern District of Louisiana.
Criminal Docket.

The United States	:	
vs.	:	No. 2245.
Robert S. Leovy et als	:	

It is agreed that all the maps, charts and plans introduced in evidence upon the trial of this case shall be annexed to and made a part of the transcript of the record to be returned with the writ of error herein, to the United States Circuit Court of Appeals for the Fifth Circuit.

It is also agreed that the testimony of E. L. Corthell in the case of the State vs. Buck and Fruit Co. introduced in evidence from the Report of that case in the 46th La. Annual Reports pp. 673, 674, 675 and part of 676 may be omitted from said transcript and read from said report upon the hearing of this case in said Court of Appeals.

New Orleans, July 13, 1898.

(Signed) J. WARD GURLEY,
U. S. Atty. for the Eastern Dist. of La.

(Signed) ROUSE & GRANT,
Attys. for Defts.

Filed July 13, 1898.

TRIAL JUDGE'S GENERAL CHARGE TO THE JURY.

Made part of Bill of Exception No. 2.
See page 133 et seq. of this Transcript.

SPECIAL CHARGES GIVEN BY THE TRIAL JUDGE TO THE JURY AT THE REQUEST OF THE DEFENDANTS.

Filed June 11, 1898, as of date June 6, 1898. Made part of Bill of Exception No. 2.

Second—The law presumes, that persons charged with crime are innocent, until they are proven by competent evidence to be guilty. This presumption of innocence is evidence in favor of the accused, introduced by the law in their behalf, and must be considered by the jury in connection with all other competent evidence in this case, and it stands as their protection, unless it has been removed by evidence proving their guilt beyond a reasonable doubt.

Granted
(Signed) Ch. P
J.

Third—That in order to establish the charge against the defendants, the proof must be such as to produce a moral certainty of guilt and exclude any other reasonable hypothesis; it must produce in effect a reasonable and moral certainty that the accused committed the offence charged. And if the evidence fails to satisfy the jury of the guilt of the defendants in manner and form as charged in the indictment, beyond a reasonable doubt they must acquit them; and if the jury have such reasonable doubt of the guilt of either of the defendants, they must acquit such defendants, as to whose guilt they have such doubt.

Granted
(Signed) Ch. P
J.

Fourth—That the jury must determine, whether Red Pass, which the defendants are accused of closing, was, at the time laid in the indictment, a navigable river, or navigable water of the United States. That it is not every small creeks in which a fishing skiff, or gunning canoe can be made to float at high water, which is deemed navigable; but in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture; and unless the jury shall be satisfied, from the evidence, that Red Pass, was, at the time, when it was closed, as alleged in the indictment, generally and commonly useful to some purpose of trade or agriculture, it was not a navigable stream, and the jury must acquit the defendants.

Granted
(Signed) Ch. P
J.

TRIAL JUDGE'S GENERAL CHARGE TO THE JURY.

Made part of Bill of Exception No. 3.
See page 133 et seq. of this Transcript.

SPECIAL INSTRUCTIONS GIVEN BY THE TRIAL JUDGE TO THE JURY, AT THE REQUEST OF THE DEFENDANTS, VIZ: DEFENDANTS' SPECIAL CHARGES NOS. 2, 3 AND 4 ON FILE, MADE PART OF BILL OF EXCEPTIONS NO. 3

See pages 147 and 148 of this Transcript.

PETITION FOR WRIT OF ERROR.

Filed June 16, 1898.

United States Circuit Court, Eastern District of Louisiana.

The United States	:	
vs.	:	No. 2245.
Augustus F. Leovy & Robert S. Leovy.	:	

To the Honorable Charles Parlange, District Judge, presiding in and holding said Circuit Court:

The petition of Robert S. Leovy, one of the defendants in the above entitled and numbered case, respectfully shows to your Honor, that he is desirous to sue out and obtain a writ of error in his behalf in this cause from the United States Circuit Court of Appeals for the Fifth Circuit, to reverse the sentence and judgment herein rendered against him; that he herewith presents said writ of error and citation thereon to the United States, together with his bond, with surety to secure the payment of the fine imposed upon him and all costs in the event that he fails to make his plea good in said Circuit Court of Appeals; and he herewith annexes and makes part thereof, his assignment of errors committed during the trial of said cause;

Wherefore he prays that said Writ of Error be allowed, returnable to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, La., within 30 days the same to operate as a supersedeas upon his giving bond

with surety in the sum of hundred dollars conditioned as the law directs.

(Signed) H. J. LEOVY
ROUSE & GRANT,
His Att'ys.

ORDER.

Let a writ of error be issued as prayed for the same to operate as supersedeas upon the defendant Robert S. Leovy giving bond in the sum of Five hundred dollars with surety conditioned as the law directs.

(Signed) CHARLES PARLANGE,
June 16, 1898. U. S. Judge.

ASSIGNMENT OF ERRORS.

Filed June 16, 1898.

United States Circuit Court, Eastern District of Louisiana.

The United States	:	
vs.	:	No. 2245, C.D.
Augustus F. Leovy & Robert S. Leovy.	:	

And now comes Robert S. Leovy, one of the defendants in this case, and makes and files with his petition for writ of error herein, the following assignments of error.

1st:—Said Court erred in sustaining the objection made by the United States Attorney to the introduction in evidence upon the trial of this cause, the resolution adopted by the Board of Commissioners of the Buras Levee District, and in refusing to permit the same to be read in evidence, a copy of which is annexed to and made a part of this bill of exception, No. 1.

2nd. Said court erred in refusing to instruct the jury, as requested by this defendant, as follows, to-wit:—"That upon consideration of the whole evidence adduced upon the trial of the case, the court direct the jury to acquit the defendants."

3rd. Said court erred in refusing to instruct the jury as requested by said defendant, as follows, to-wit:—"If the jury shall find, that Red Pass is not a natural stream, but simply the result of a crevasse, or out-break of the Missis-

sippi river from its natural channel, they must acquit the defendants."

4th. Said court erred in refusing to instruct the jury, as requested by the defendants, as follows, to-wit:—"If the jury shall find that Red Pass was a crevasse, or outbreak, of the Mississippi river from its natural channel, the result of which was to overflow a large portion of Plaquemine Parish to the detriment of the inhabitants thereof, by the destruction of their property, and prejudicial to their health, the State, in the exercise of its police power, delegated to the Police Jury of the Parish of Plaquemine, had a right to close it."

5th. Said court erred in refusing to instruct the jury, as requested by the defendant, as follows, to-wit:—"If the jury shall find that Red Pass is a crevasse, or outbreak of the Mississippi river from its natural channel, and overflowed the lands situated on the banks of Red Pass, and that its closing was necessary to reclaim, drain, or levee said lands, or any of them, then it was the duty of the State under the Acts of Congress of 1849 and 1850, to close Red Pass."

6th. Said court erred in refusing to instruct the jury, as requested by the defendants, as follows, to-wit:—"Unless the jury shall be satisfied, from the evidence, that Red Pass was, at the time when it was closed, as alleged in the indictment, substantially useful to some purpose of interstate commerce, the jury are instructed that any Federal legislation, purporting to prohibit, or prevent, or interfere with the closing of said stream, would be beyond the powers granted to the Congress by Art. I Sec. 9 of the Constitution, or otherwise vested by the Constitution of the United States in Congress, and would be contrary to amendment 10 of the Constitution of the United States. And the jury are instructed that the defendants claiming and being entitled to the protection of that constitution, must be acquitted."

7th. Said court erred in refusing to instruct the jury, as requested by the defendants, as follows, to-wit:—"If the jury shall find that the dam constructed at the mouth of Red Pass, was constructed by authority of the Police Jury of the Parish of Plaquemine, and that the defendant Robert S. Leovy was an officer of said Parish, and in constructing said dam, was acting as such under authority of the Police Jury thereof, they must acquit him."

8th. Said court erred in giving the following instruc-

tion to the jury; "I wish also to say, that the question whether some 60 years ago, the Jump resulted from the enlargement of some canal which was then in existence, and has been contended here was a crevasse in that sense of the word, you are not to consider at all. As you have been appealed to in the argument to consider that this question involved the right of the State to close a gap in its levees, I say, that you have nothing of that sort to consider. I repeat to you, that whether or not 60 years ago, the Jump was formed in the manner in which it was contended it was, is not a matter for your consideration."

9th. Said court erred in instructing the jury as follows, to-wit:—"I charge you gentlemen, that the Police Jury of the Parish had no right to authorize Mr. Robert S. Lœvy to dam Red Pass, if Red Pass was a navigable water of the United States. I say that it had no authority, because in the year 1890, the Congress of the United States passed the law under which this indictment has been brought, forbidding the damming of any navigable stream of the United States, without the previous authorization of the Secretary of War. Therefore, as it was not contended in this case that there was any authority from the Secretary, but on the contrary, there is proof tending to show there was no such authority, then it results, that it is no defense for Mr. Robert S. Lœvy to show his pretended, or alleged authority from the Police Jury of the Parish of Plaquemine. The Police Jury of the Parish of Plaquemine could not lawfully have dammed it, therefore Mr. Lœvy could not."

10. Said court erred in instructing the jury, as follows, to-wit:—"What is a navigable water of the United States? It is a navigable water, which, either of itself, or in connection with other water permits a continuous journey to another State. If a stream is navigable, and from that stream you can make a journey by water, by boat, by one of the principal methods used in ordinary commerce, to another State from the State in which you start on your journey, that is a navigable water of the United States. It is so called, in contradistinction to waters which arise and come to an end within the boundaries of the State. * * * But if from the water in one State you can travel by water continuously to another State, and the water is a navigable water, then it is a navigable stream of the United States. * * * If it was navigable and connected with waters that permitted a journey to another State, then it

is a navigable water of the United States. In this case, if it was navigable, it would be a navigable water of the United States, or might be so in two ways; by conecting with the water of the Mississippi. I mean to say, that if there is evidence here, that you could leave the Mississippi and go into the Jump, and then go to the place where this dam was built by Robert S. Leovy, and some distance beyond that and that it was navigable for boats or vessels carrying on commerce, then it would be a navigable water of the United States because it would connect with the Mississippi, you could go to the other States of the Union. I say again, that it might connect in another way. It might connect through the Gulf. But the fact that I wish to impress upon you is this, that it is not absolutely necessary that you should find that there was navigability all the way from the Jump out to the Gulf, because if from some point beyond the place, where Mr. Robert S. Leovy built this dam, towards the Mississippi river, the stream was navigable, then it would be a navigable stream of the United States, because it would connect with the Mississippi River."

11th. Said court erred in rendering sentence and judgment herein against this defendant on the verdict of the jury herein, as the same is of record, because there was no penalty imposed by law for the offense charged in said indictment, of which this defendant was convicted.

Wherefore, by reason of the premises, and for the errors assigned, and others manifest upon the face of the record, said Robert S. Leovy prays that said judgment and sentence may be reversed and set aside, and that he be discharged from the premises, and go hence without day.

(Signed) H. J. LEOVY,
ROUSE & GRANT,
Att'ys for R. S. Leovy, Deft.

BOND.

Filed June 16, 1898.

KNOW ALL MEN BY THESE PRESENTS, That we, Robert S. Leovy, as principal, and Henry J. Leovy, as surety, are held and firmly bound unto the United States of America in the full and just sum of Five Hundred Dol-

lars to be paid to the United States its certain attorney, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 16th day of June in the year of our Lord one thousand eight hundred and ninety-eight.

WHEREAS, lately at a session of the United States Circuit Court in and for the Eastern District of Louisiana in a suit depending in said Court, between said United States of America, and Augustus F. Leovy and Robert S. Leovy numbered 2245 upon the Docket of said Court a sentence and Judgment was rendered against the said Robert S. Leovy and the said Robert S. Leovy having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the sentence and Judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear before the United States Court of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said Robert S. Leovy shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

(Signed) LEOVY & LEOVY,
(Seal) Att'ys for R. S. Leovy.
(Signed) J. D. ROUSE.
(Signed) (Seal) HENRY J. LEOVY.

Approved by—

(Signed) CHARLES PARLANGE,
U. S. Judge.

(Indorsed) No. 2245 C. D. United States vs. A. F. Leovy & Robt. S. Leovy. Bond.

UNITED STATES OF AMERICA, ss:

The President of the United States, to the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Louisiana, Greeting:

Because in the record and proceedings, as also in the

rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between The United States of America, and Augustus F. Leovy & Robert S. Leovy, numbered 2245 upon the Docket of said Court, a manifest error hath happened, to the great damage of the said Robert S. Leovy as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and a full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, together with this writ, so that you have the same at New Orleans, Louisiana, within 30 days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

E. R. HUNT,
Clerk of the U. S. Circuit Court, for the Eastern District of Louisiana.

By H. J. CARTER,
Dy. Clerk.

Allowed by—

CHARLES PARLANGE,
U. S. Judge.

(Indorsed)—No. 2245 C. D. United States vs. Writ of Error. A. F. Leovy & Robt. S. Leovy. Filed June 16, 1898. H. J. Carter, Deputy Clerk.

The United States of America, Fifth Judicial Circuit.

The President of the United States, to the United States of America, Greeting:

You are hereby cited and admonished to be and appear

before the United States Circuit Court of Appeals, for the Fifth Circuit at New Orleans, Louisiana, within 30 days from the date hereof, pursuant to a writ of error sued out and filed in the Clerk's Office of the Circuit Court of the United States for the Eastern District of Louisiana in the cause wherein the United States of America are plaintiffs and Augustus F. Leovy and Robert S. Leovy are defendants No. 2245 of the Docket of said Court to show cause, if any there be, why the sentence and judgment rendered against the said Robert S. Leovy as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles Parlange, Judge of the District Court of the United States, for the Eastern District of Louisiana, this 16th day of June in the year of our Lord one thousand eight hundred and ninety-eight.

CHARLES PARLANGE, Judge.

Service accepted June 16, 1898.

J. WARD GURLEY,
U. S. Atty. for East. Dist. of La.

(Indorsed) No. 2245, C. D. United States vs. Citation. A. F. Leovy & Robt. S. Leovy. Marshal's Return. U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division. Filed June 16, 1898. E. R. Hunt, Clerk.

United States of America, Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

Clerk's Office:

I, Edward R. Hunt, Clerk of the Circuit Court of the United States, for the Fifth Circuit and Eastern District of Louisiana, do hereby certify, that the foregoing 157 pages contain and form a full, complete, true and perfect transcript of the Record and Proceedings had, together with all the evidence adduced on the trial of the case of United States vs. A. F. Leovy & Robt. S. Leovy, No. 2245 of the Docket of the said Court.

Witness my hand and the seal of said Court, at the City of New Orleans, this 11 day of July, A. D., 1898.

(Seal) E. R. HUNT, Clerk.

I, Charles Parlange, United States Judge for the Eastern District of Louisiana, do certify, that Edward R. Hunt, whose name is signed to the above certificate as Clerk of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, was, at the time of signing said certificate, and is now the Clerk of said Court. That said certificate is in due form of law, and that full faith and credit are due to his official attestations as such Clerk.

Given under my hand, at the City of New Orleans, in said district this 11 day of July, A. D., 1898.

CHARLES PARLANGE, Judge.

HEARING AND CONTINUANCE.

United States Circuit Court of Appeals, Fifth Circuit.
November Term, 1898.
Tuesday, February 7, 1899.
(Extract from Minutes).

Robert S. Leovy,
vs. } No. 745.
United States.

This cause was regularly called this day, and was argued by Mr. H. J. Leovy and Mr. Victor Leovy for plaintiff in error, and by Mr. J. Ward Gurley for defendant in error, when the further hearing was postponed until to-morrow.

HEARING AND SUBMISSION.

November Term, 1898.
Wednesday, February 8, 1899.
(Extract from Minutes).

Robert S. Leovy
vs. } No. 745.
United States.

This cause came on again to be heard this day, and was submitted to the Court after further argument by Mr. Jno. D. Rouse for the plaintiff in error.

JUDGMENT.

United States Circuit Court of Appeals, Fifth Circuit.
November Term, 1898.
Tuesday, February 28, 1899.

Robert S. Leovy
vs. } No. 745.
United States.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be and the same is hereby affirmed.

OPINION.

United States Circuit Court of Appeals, Fifth Circuit.
November Term, 1898.

Robert S. Leovy, Plaintiff in Error,
vs.
The United States of America, Defendant in Error. } No. 745.

Error to the Circuit Court of the United States, Eastern District of Louisiana.

Before Pardee and McCormick, Circuit Judges, and Swayne, District Judge.

Augustus F. Leovy and Robert S. Leovy were indicted on May 19th, 1897, under Act of September 19, 1890, 26th Stat. at Large, p. 454, as amended by Act of July 13, 1892, 27th Stat. at Large, Ch. 158, Sec. 3, p. 110.

The indictment charged them with having on November 16th, 1895, and other days during that month, built a dam across Red Pass, a navigable stream of the United States, in the Parish of Plaquemine, Louisiana, without permission of the Secretary of War, and thus having closed said navigable stream in violation of said law.

Defendants pleaded not guilty, and on trial the jury rendered a verdict finding Augustus F. Leovy not guilty, and finding Robert S. Leovy guilty as charged; and the Court sentenced Robert S. Leovy to pay a fine of two hundred dollars and costs of prosecution.

Plaintiff in error, Robert S. Leovy, on the trial, reserved three bills of exceptions to the rulings of the trial Judge, and on this writ presented eleven assignments of error. These exceptions and assignments of error, summarized, are as follows, viz.:

Bill No. 1 and assignment No. 1 complain because the trial Judge refused to allow the defendants to put in evidence a resolution passed by the Board of Commissioners for Buras Levee District, on November 20, 1897, approving the action of Robert S. Leovy in damming and closing of said Red Pass.

Bill No. 2 and assignment No. 2 complain because the trial Judge refused to instruct the jury to acquit the defendants.

Bill No. 3 and assignments Nos. 3, 4, 5, 6, 7, 8, 9 and 10 embrace the following complaints, viz:

a. Because the trial Judge refused to instruct the jury that "if the jury shall find that Red Pass is not a natural stream, but simply the result of a crevasse, or outbreak of the Mississippi River, from its natural channel, they must acquit defendants."

b. Because the Court refused to charge the jury that "if the jury shall find that Red Pass was a crevasse or outbreak of the Mississippi River from its natural channel, the result of which was to overflow a large portion of Plaquemine Parish, to the detriment of the inhabitants thereof by the destruction of their property and prejudicial to their health, the State, in the exercise of its police power delegated to the police jury of the Parish of Plaquemine, had a right to close it."

c. Because the trial Judge refused to instruct the jury that "if the jury shall find that Red Pass is a crevasse, or outbreak of the Mississippi River, from its natural channel, and overflows the lands situated on the banks of Red Pass, and that its closing was necessary to reclaim, drain, or levee said lands or any of them, then it was the duty of the State, under the Acts of Congress of 1849 and 1850, to close Red Pass."

d. Because the Court refused to charge that "Unless the jury shall be satisfied from the evidence that Red Pass was, at the time when it was closed, as alleged in the indictment, substantially useful to some purpose of interstate commerce, the jury are instructed that any Federal Legislation purporting to prohibit, or prevent, or interfere with the closing of said stream, would be beyond the powers granted to the Congress of the United States by Art. 1, Sec. 9 of the Constitution, or otherwise vested by the Constitution of the United States in Congress, and would be contrary to amendment 10 of the Constitution of the United States. And the jury are instructed, that the defendants claiming and being entitled to the protection of that Constitution, must be acquitted."

e. Because the Court refused to request and charge the jury that "If the jury shall find that the dam constructed at the mouth of Red Pass, was constructed by authority of

the police jury of the Parish of Plaquemine, and that the defendant, Robert S. Leovy, was an officer of said Parish, and in constructing said dam was acting as such under authority of the police jury thereof, they must acquit him."

f. Certain portions of the general charge are also objected to, viz:

"I wish also to say, that the question whether some 60 years ago, the Jump resulted from the enlargement of some canal which was then in existence, or as has been contended here was a crevasse in that sense of the word, you are not to consider at all. As you have been appealed to in the argument to consider that this question involved the right of the State to close a gap in its levees, I say, that you have nothing of that sort to consider. I repeat to you, that whether or not 60 years ago, the Jump was formed in the manner in which it was contended it was, is not a matter for your consideration."

"I charge you, gentlemen, that the Police Jury of the Parish had no right to authorize Mr. Robert S. Leovy to dam Red Pass, if Red Pass was a navigable water of the United States. I say that it had no authority, because in the year 1890 the Congress of the United States passed the law under which this indictment has been brought, forbidding the damming of any navigable stream of the United States, without the previous authorization of the Secretary of War. Therefore, as it was not contended in this case that there was any authority from the Secretary, but on the contrary there is proof tending to show there was no such authority, then it results that it is no defense for Mr. Robert S. Leovy to show his pretended, or alleged authority from the Police Jury of the Parish of Plaquemine. The Police Jury of the Parish of Plaquemine could not lawfully have dammed it, therefore Mr. Leovy could not."

"What is a navigable water of the United States? It is a navigable water, which, either of itself or in connection with other water, permits a continuous journey to another State. If a stream is navigable, and from that stream you can make a journey by water, by boat, by one of the principal methods used in ordinary commerce, to another State

from the State in which you start on that journey, then it is a navigable water of the United States. It is so called, in contradistinction to waters which arise and come to an end within the boundaries of the State. * * * But if from the water in one State you can travel by water continuously to another State, and the water is a navigable water, then it is a navigable stream of the United States. * * * If it was navigable and connected with waters that permitted a journey to another State, then it is a navigable water of the United States. In this case, if it was navigable, it would be a navigable water of the United States, or might be so in two ways; by connecting with the waters of the Gulf, if you should find it connected that way, or by connecting with the waters of the Mississippi. I mean to say that if there is evidence here, that you could leave the Mississippi and go into the Jump, and then go to the place where this dam was built by Robert S. Leovy, and some distance beyond that, and that it was navigable for boats or vessels carrying on commerce, then it would be a navigable water of the United States because it would connect with the Mississippi, and from the Mississippi you could go to the other States of the Union. I say again that it might connect in another way. It might connect through the Gulf. But the fact that I wish to impress upon you is this, that it is not absolutely necessary that you should find that there was navigability all the way from the Jump out to the Gulf, because if from some point beyond the place where Mr. Robert S. Leovy built this dam, towards the Mississippi River, the stream was navigable, then it would be a navigable stream of the United States, because it would connect with the Mississippi River."

The 11th assignment of error complains about the sentence and judgment, because it is averred "there was no penalty imposed by law for the offense charged."

After stating the case as above, the opinion of the Court was delivered by Pardee, Circuit Judge:

The first assignment of error, based upon the first bill of exceptions, complains of the refusal of the Court to permit to be read in evidence on the trial a certified copy of a

resolution passed by the Board of Commissioners for Buras Levee District at a meeting thereof, held on the 20th of November, 1897, said Board of Commissioners of Buras Levee District being a body corporate under the laws of Louisiana, whose duties and powers are defined by law. The bill of exceptions does not recite any facts proved or offered to be proved, nor any other matter tending to show whether the resolution offered was relevant or irrelevant; and, standing by itself, the bill presents a purely abstract question. It is true that in another bill of exceptions all the evidence admitted and offered in the case, is recited, but it is not the duty of the Court to go through the whole body of evidence to find a state of facts which would make the resolution offered pertinent to some issue in the case. As a matter of fact, however, the resolution offered was one passed by the Board of Commissioners after the indictment found, and it was wholly irrelevant to any issue presented before the jury.

The 2d assignment of error is based on a bill of exceptions which contains all the evidence taken and offered on the trial of the case, and the complaint is that upon consideration of the whole evidence adduced, the Court erred in refusing to direct the jury to acquit the defendants. Whether or not Red Pass was a navigable stream within the meaning of the River and Harbor Act of September 19, 1890, and the amendments of Section 7, of the Act of July 13, 1892, is a question of law and fact, and the evidence submitted thereon was conflicting. The question was properly left to the jury under the instructions of the Court.

The 3d assignment of error complains of the refusal of the Court to instruct the jury that if they should find that Red Pass was not a natural stream, but simply the result of a crevasse or outbreak of the Mississippi River from its natural channel, they must acquit the defendants.

The proposition of law involved, even if correct in principle, is too general in terms, and the effect of it, under the evidence which tended to show that over sixty years ago there was a crevasse or outbreak in the Mississippi River at the Jump, resulting in the formation of Red Pass, which might have been, and probably was, a navigable stream

from that date, would have been to confuse and embarrass the jury.

We notice that the 8th assignment of error complains of a part of the charge given to the jury, as follows: "I wish also to say, that the question whether some sixty years ago the Jump resulted from the enlargement of some canal which was then in existence, or, as has been contended here, was a crevasse in that sense of the word, you are not to consider at all. As you have been appealed to in the argument to consider that this question involved the right of the State to close a gap in its levees—I say, that you have nothing of that sort to consider. I repeat to you, that whether or not sixty years ago, the Jump was formed in the manner in which it was contended it was, is not a matter for your consideration."

From our examination of the whole evidence brought up in the record and the whole charge as given, we are of opinion that this instruction was correct and proper, no such case having been made as would warrant the jury to consider whether or not Red Pass was the result of a crevasse; at the same time, it is proper to say that a recent crevasse in the levee on the bank of the Mississippi river or other navigable stream may be closed by the State or local authority, although while open it may be navigable; but it does not follow that an outlet of the Mississippi River near its mouth, resulting from an outbreak of the natural channel over sixty years ago and which became navigable long before the United States ceded the swamp lands to the State of Louisiana for drainage purposes, and which has since been a highway for commerce, may now be closed by either the State or local authorities without the consent of the United States.

This disposes of the 3d and 8th assignments of error.

The 4th assignment of error raises the question whether the Court ought to have instructed the jury on request that the Police Jury of the Parish of Plaquemines had the right to close Red Pass in the exercise of the police power of the State delegated to said Police Jury.

There is no legitimate evidence in the record tending to show that the Police Jury of the Parish of Plaquemines

ordered Red Pass closed for the purpose of "affecting or promoting the peace, morals, education, health or good order of the people;" but the case does show that the Pass was ordered closed and was closed for the sole purpose of reclaiming swamp lands.

Under the power to regulate commerce, Congress having forbidden the closing of any navigable water without the consent of the United States, it is very doubtful whether any navigable water of the United States, although wholly within the limits of the State, can be closed under the exercise of the police power of the State for any purpose whatever, but where the purpose only is the reclamation of swamp lands, there is no doubt the police power of the State must give way to the authority of Congress.

Gulf Colorado & Railway Co. vs. Hefley, 158 U. S. 98, is an interesting case on this subject, and we quote from page 104, as follows:

"Generally, it may be said in respect to laws of this character that, though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the States, is subordinate to those in terms conferred by the Constitution upon the nation. 'No urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.' *Henderson vs. New York*, 92 U. S. 259, 271. 'Definitions of the police power must, however, be taken subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.' *New Orleans Gas Co. vs. Louisiana Light Co.*, 115 U. S. 650, 661. 'While it may be a police power in the sense that all provisions for the health, comfort and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this Court that, where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail.' *Morgan vs. Louisiana*, 118 U. S. 455, 464."

The charge as requested was properly refused as incorrect in law as well as inapplicable to the case before the jury.

We understand that the 7th and 9th assignments of errors were intended to raise this same question as to the right of the Police Jury of the Parish of Plaquemines to close Red Pass under the police power of the State of Louisiana, irrespective of the Statutes of the United States forbidding the closing of navigable streams without the consent of the Secretary of War, and for the reasons given as to the 4th assignment, if for no other, the said assignments are without merit.

The 5th assignment of error is not apparently insisted upon and needs no consideration.

The 6th assignment of error raises the question whether the Court erred in refusing the request to instruct the jury as follows: "Unless the jury shall be satisfied, from the evidence, that Red Pass was, at the time when it was closed, as alleged in the indictment, substantially useful to some purpose of interstate commerce, the jury are instructed that any Federal legislation, purporting to prohibit or prevent, or interfere with the closing of said stream, would be beyond the powers granted to the Congress by Art. 1, Sec. 9 of the Constitution, or otherwise vested by the Constitution of the United States in Congress, and would be contrary to amendment 10 of the Constitution of the United States. And the jury are instructed that the defendants claiming and being entitled to the protection of that Constitution, must be acquitted."

Section 9, Article 1, of the Constitution, does not appear to have much bearing on the subject, but the third paragraph of Section 8, Article 1, gives Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes, and is probably the provision of Article 1 which was intended to be referred to. Article 10 of the amendments of the Constitution of the United States is that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

It is well settled that the power to regulate commerce

with foreign nations and among the several States "comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States which are accessible from a State other than those in which they lie." The requested instruction appears to mean that if the jury should not be satisfied from the evidence that Red Pass, at the time when it was closed, was a navigable water of the United States, within the proper definitions of the term "navigable water," then any Federal legislation purporting to prohibit, or prevent or interfere with the closing of said stream, would be beyond the power of Congress. If this is what it means, the proposition must be conceded, but its applicability as a separate proposition in the present case is not apparent. The contention of the government was that Red Pass was a navigable stream when the defendants closed it, and it was only on the theory that it was a navigable stream at that time that the defendants could have been convicted at all.

The 10th assignment of error complains of the charge of the Judge defining what is a navigable water of the United States.

The charge in this respect, as given by the trial Judge, seems to be in accord with the decisions of the Supreme Court of the United States, and we see no error therein. No specific error in the charge given is pointed out, but the plaintiff in error contends that Red Pass was essentially a stream wholly within the State, and wholly within the jurisdiction of the State, and therefore the State had the authority to close the same without the consent of the government of the United States.

"The power vested in the general government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in fact, so far as may be necessary to insure their free navigation when, by themselves or their connection with other waters, they have a continuous channel for commerce among the States or with foreign countries." The Daniel Ball, 10 Wall. 557.

The above proposition was reiterated in Escanaba Co. vs. Chicago, 107 U. S. 678, in which case it was held that the Chicago River and its branches, although wholly within

the State of Illinois, must be deemed navigable waters of the United States over which Congress, under its commercial power, must exercise control to the extent necessary to protect, preserve and improve their free navigation.

Escanaba Co. vs. Chicago has been frequently recognized and approved by the Supreme Court, and it is wholly inconsistent with the proposition that any State may close up a navigable water of the United States without the consent of the United States, although such navigable water may be wholly within the limits of such State.

In the Rivers and Harbors Act, approved September 19, 1890, 26th Stat. at Large, ch. 907, pp. 426, 454, it is provided in Section 7 as follows:

"That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty or structure of any kind outside established harbor-lines, or in any navigable waters of the United States where no harbor-lines are or may be established without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any Act of the Legislative Assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge draw, bridge piers and abutments, the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments, or other works, under an Act of the Legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State."

The 10th Section of the same Act provided as follows:

"Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this Act mentioned, or who shall violate the provisions of the last four preceding sections of this Act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the Court, the creating or continuing of any unlawful obstruction in this Act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney General of the United States."

In the Rivers and Harbors Act of 1892, 27 Stat. at Large, Ch. 158, pp. 88, 110, Section 7 of the Act of 1890 was amended and re-enacted so as to read as follows:

"That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty or structure of any kind outside established harbor-lines, or in any navigable waters of the United States where no harbor-lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters; and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river or navigable waters of the United States, under any Act of the Legislative Assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, harbor of refuge, or inclosure within the limits of any

breakwater, or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War.

"Provided: That this section shall not apply to any bridge, bridge draw, bridge piers and abutments, the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments, or other works under an Act of the Legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State."

The amendment relates only to altering ports and harbors, etc., and otherwise the re-enacted section is the same as the original.

The intention and effect of the legislation of 1892 was to embody in the Act of 1890 the amended and re-enacted section, so that the provisions of Section 10 of the Act of 1890 should apply to the violation of the amended and re-enacted section, the same as to the violation of Section 7 as originally enacted. See Black on Interpretation of Laws, pp. 356, 357.

We, therefore, conclude that the 11th assignment of error is without merit.

At the close of the very able and ingenious brief of the learned counsel for the plaintiff in error, we find:

"In conclusion, we beg again to remind the Court that the issues in this case are not confined to the question of closing Red Pass only. Numerous passes of like character extend through all the swamp lands granted by Congress in 1849 and 1850 to Louisiana and other States, to be drained and reclaimed; and, if the power be denied to close them, or even if this power be made subject to the arbitrary control of the Secretary of War, the reclaiming of millions of acres of land will be rendered impracticable, if not wholly impossible.

"The theory contended for by the prosecution would, if maintained, revolutionize the entire relation of the Federal Government to the State levee, quarantine, inspection and other authorities, and fill the Federal Courts with the clamors of all those discontented with the administration

of police laws. It would seriously embarrass officials charged with the execution of vitally important measures in times of great public danger through flood and pestilence. Indeed, it is hardly an exaggeration to say that the police power is the State, embracing, as it does, under the authorities, the prevention of flood and fire, disease and crime, and all other physical and moral evils. No Federal Statute expressly excepts State officers charged with such duties from criminal punishment for official acts; but, under the authorities, not even the Constitutional Amendments, much less Federal Statutes, were meant to subject to indictment for their official and vitally necessary actions the State's quarantine, fire, inspection, police or levee officials, any more than its officers of justice or the Judges of its Courts."

We notice this, merely to say, that if the picture of evils, resulting from maintaining the Statute of the United States forbidding the closing of navigable waters is correctly drawn, the remedy lies in Congressional rather than in judicial legislation. It does not appear to us, however, that the enforcement of the Federal Statute ought to have any such disastrous and humiliating effects. It is not to be supposed that the Secretary of War will refuse his approval to any reasonable closing of swamp outlets and bayous wholly within or partly within a State whenever the same is necessary or apparently necessary to protect the health, morals or general good of the community interested. It is probable that all that will be necessary will be to apply, showing the apparent need of the work proposed; and such application to the Government controlling the navigable waters of the United States may well be made, and without compromise of dignity by any State officer or board, or even by the State itself.

The judgment of the Circuit Court is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS
For the Fifth Circuit.

I, J. M. McKee, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing 149 pages, numbered from *a* to 148, inclusive, contain a true copy of the record and all proceedings had, including the opinion of the Court, in the case of Robert S. Leovy vs. The United State, No. 745, as the same remains upon the files and records of said United States Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States
[SEAL] Circuit Court of Appeals, at the City of New Orleans, this 10th day of March, A. D. 1899.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

12142

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Robert S. Leovy is plaintiff in error and The United States is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the eastern district of Louisiana, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the second day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. No. 746, October term, 1898. Robert S. Leovy *vs.* The United States. Writ of certiorari.

The within writ received this May 6, 1899, and in accordance with the certified copy of the agreement of counsel hereto attached and made a part hereof, I now, by direction of the judges of the United States circuit court of appeals for the fifth circuit, do hereby certify that the transcript of the record now on file in the office of the clerk of the Supreme Court and upon which the within writ was allowed is a true, full, and perfect transcript of the record and of all proceedings had, including the opinion of the court, in the cause named in the within writ.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this May 6th, 1899.

J. M. McKEE,
Clerk United States Circuit Court of Appeals for the Fifth Circuit.

In the Supreme Court of the United States, October Term, 1898.

ROBERT S. LEOVY
v.
THE UNITED STATES. } No. —.

Stipulation as to Return to Writ of Certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record of said cause in the circuit court of appeals for the fifth circuit, now on file in the Supreme Court of the United States, may be taken as the return of the clerk of said circuit court of appeals to the writ of certiorari issued herein.

H. J. LEOVY,
VICTOR LEOVY,
ALEXANDER PORTER MORSE,
Counsel for Petitioner.
J. K. RICHARDS, *Solicitor General.*

Endorsed: Stipulation as to return to writ of certiorari. Filed May 6, 1899. J. M. McKee, clerk.

A true copy.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

Attest: J. M. McKEE, *Clerk.*

[Endorsed:] File No., 17,331. Supreme Court U.S., October term, 1899. Term No., 238. Robert S. Leovy, petitioner, *vs.* The United States. Writ of certiorari and return. Filed May 10, 1899.

12143

SUPREME COURT U. S.
FILED
MAR 31 1899
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

No. 946 238

ROBERT S. LEOVY, PETITIONER,

versus

THE UNITED STATES, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI.

HENRY J. LEOVY,
VICTOR LEOVY,
Alexander Porter Morse, *Attorneys for Petitioner.*

Thomason, Print., 526 Natchez Street, N. O.

SUPREME COURT OF THE UNITED STATES.

No. ....

ROBERT S. LEOVY, PETITIONER,

versus

THE UNITED STATES, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI.

The petition of Robert S. Leovy, a citizen and resident of the Parish of Plaquemines, State of Louisiana, for a writ of *certiorari* directed to the United States Circuit Court of Appeals for the Fifth Circuit, to bring before the Supreme Court of the United States the case of Robert S. Leovy, appellant, against the United States, appellee.

To the Honorable the Supreme Court of the United States:

The said petitioner respectfully shows this Honorable Court as follows:

1. That prior to the year 1849, the River Mississippi broke through its banks at a point about twelve miles above its mouth, and formed several small streams, known as Red Pass, Tiger Pass, Main Pass, Williams' Pass and Spanish Pass.

2. That in the year 1849, the United States donated to the State of Louisiana all the swamp land within the State,

by an Act of Congress entitled, "An Act to aid the State of Louisiana in draining the swamp land therein," the first paragraph of which reads as follows: "To aid the State of Louisiana in constructing the necessary drains to redeem the swamp and overflowed land therein," the said swamp lands are hereby donated, etc. In 1850 similar grants were made to other States.

3. The State sold to many persons large tracts of this land, which have been converted into orange orchards and truck and rice farms.

4. In July, 1890, the Police Jury of the Parish of Plaquemines, vested by law with police powers and control of the levees, authorized, by formal resolution, the syndic of the Fifth Ward of said Parish to close Red Pass.

5. Said Robert S. Leovy, said syndic, acting under the authority in him vested, had the said Red Pass closed.

6. Thereafter the Police Jury ratified the action of their said syndic by the following resolution:

"Whereas, the Police Jury of the Parish of Plaquemines adopted a resolution on July 1, 1890, authorizing and directing the closing of Red Pass, a part of the jump, an old crevasse of the Mississippi River, and pursuant thereto Robert S. Leovy, the syndic of the Fifth Ward of said parish, did close the same, and the closing thereof has reclaimed large tracts of worthless sea marsh and made it valuable and taxable land, and, by drainage, has improved the health of the district and improved all the land near the Mississippi front; and

"Whereas, since the closing of said Red Pass, great improvements have been made on the land adjoining the Pass, and many orchards have been built up which will be damaged by the opening of Red Pass; and

"Whereas, the Levee Board of this district has made the new bank a part of the levee district by resolution passed

November 20, 1897, and protested against the opening of Red Pass;

"Be it resolved, That this Board hereby ratifies and approves the act of said Robert S. Leovy in closing said Red Pass, and unites with the Buras Levee Board in protesting against the opening thereof, and requests the attorney of the Board to take such steps as may be necessary to prevent said Pass from being opened."

7. That later, the Levee Board of the Parish (the successor of the Police Jury in matters pertaining to levees), adopted the bar placed at the head of Red Pass, and connected it with the old levees, thus making it a part of the general levee system required for the protection of the district.

8. That the closing of said Pass or crevasse was done by the police power of the State to drain the swamp and low malarial lands; to prevent inundation of the property of the people in the vicinity; to preserve their health and to comply with the conditions of the grant of the swamp lands to the State, by draining and leveeing them. The evidence shows that this extensive grant cannot be utilized without closing the numerous small outlets or crevasses from the river. The power to close crevasses, essential to the safety of the people, has always been exercised by the State, and has never been questioned.

9. That your petitioner was indicted and a verdict rendered against him and he was sentenced to pay a fine, in the New Orleans Division, Eastern District of Louisiana, in the Circuit Court of the United States for the Fifth Circuit, on June 6th, 1898, for alleged violation of an Act of Congress of September 19th, 1890, and the amendment thereto of July 13th, 1882 (27 U. S. Statutes at Large, p.

110, Vol. 2, Sup. Revised Stat., p. 30, Chapter 158), in building and causing to be built a dam in and across a certain navigable stream of the United States known as Red Pass, without the permission of the Secretary of War of the United States. The cause was then taken to the United States Circuit Court of Appeals for the Fifth Circuit, by writ of error, and the judgment of the Circuit Court was affirmed on February 28th, 1899.

10. That the penal clause of the Act of 1890 was repealed by the said amendment of 1892, all of which will more fully appear from the transcript of the record filed herewith.

And your petitioner shows that the assignment of errors were well made and should have been sustained; that they are now again presented for consideration and action of this Honorable Court. They are as follows:

ASSIGNMENT OF ERRORS.

And now comes Robert S. Leovy, one of the defendants in this case, and makes and files with his petition for writ of error herein, the following assignments of error:

1st. Said court erred in sustaining the objection made by the United States Attorney to the introduction in evidence upon the trial of this cause, the resolution adopted by the Board of Commissioners of the Buras Levee District, and in refusing to permit the same to be read in evidence, a copy of which is annexed to and made a part of this bill of exception, No. 1.

2d. Said court erred in refusing to instruct the jury, as requested by this defendant, as follows, to-wit: "That upon consideration of the whole evidence adduced upon the trial of the case, the court direct the jury to acquit the defendants."

3d. Said court erred in refusing to instruct the jury as requested by said defendant, as follows, to-wit: "If the jury shall find that Red Pass is not a natural stream, but

simply the result of a crevasse, or out-break of the Mississippi river from its natural channel, they must acquit the defendants."

4th. Said court erred in refusing to instruct the jury, as requested by the defendants, as follows, to-wit: "If the jury shall find that Red Pass was a crevasse, or out-break, of the Mississippi river from its natural channel, the result of which was to overflow a large portion of Plaquemine Parish to the detriment of the inhabitants thereof, by the destruction of their property, and prejudicial to their health, the State, in the exercise of its police power, delegated to the Police Jury of the Parish of Plaquemine, had a right to close it."

5th. Said court erred in refusing to instruct the jury, as requested by the defendant, as follows, to-wit: "If the jury shall find that Red Pass is a crevasse, or out-break of the Mississippi river from its natural channel, and overflowed the lands situated on the banks of Red Pass, and that its closing was necessary to reclaim, drain, or levee said lands, or any of them, then it was the duty of the State, under the Acts of Congress of 1849 and 1850, to close Red Pass."

6th. Said court erred in refusing to instruct the jury, as requested by the defendants, as follows, to-wit: "Unless the jury shall be satisfied, from the evidence, that Red Pass was, at the time when it was closed, as alleged in the indictment, substantially useful to some purpose of interstate commerce, the jury are instructed that any Federal legislation, purporting to prohibit, or prevent, or interfere with the closing of said stream, would be beyond the powers granted to the Congress by Art I, Sec. 9 of the Constitution, or otherwise vested by the Constitution of the United States in Congress, and would be contrary to amendment 10 of the Constitution of the United States. And the jury are instructed that the defendants, claiming and being entitled to the protection of that Constitution, must be acquitted."

7th. Said court erred in refusing to instruct the jury, as requested by the defendants, as follows, to-wit: "If the

jury shall find that the dam constructed at the mouth of Red Pass, was constructed by authority of the Police Jury of the Parish of Plaquemine, and that the defendant, Robert S. Leovy, was an officer of said parish, and in constructing said dam was acting as such under authority of the Police Jury thereof, they must acquit him."

8th. Said court erred in giving the following instruction to the jury: "I wish also to say, that the question whether some 60 years ago, the Jump resulted from the enlargement of some canal which was then in existence, and has been contended here was a crevasse in that sense of the word, you are not to consider at all. As you have been appealed to in the argument to consider that this question involved the right of the State to close a gap in its levees, I say, that you have nothing of that sort to consider. I repeat to you, that whether or not 60 years ago, the Jump was formed in the manner in which it was contended it was, is not a matter for your consideration."

9th. Said Court erred in instructing the jury, as follows, to-wit: "I charge you, gentlemen, that the Police Jury of the parish had no right to authorize Mr. Robert S. Leovy to dam Red Pass, if Red Pass was a navigable water of the United States. I say that it had no authority, because in the year 1890, the Congress of the United States passed the law under which this indictment has been brought, forbidding the damming of any navigable stream of the United States, without the previous authorization of the Secretary of War. Therefore, as it was not contended in this case that there was any authority from the Secretary, but, on the contrary, there is proof tending to show there was no such authority, then it results, that it is no defense for Mr. Robert S. Leovy to show his pretended, or alleged authority from the Police Jury of the Parish of Plaquemine. The Police Jury of the Parish of Plaquemine could not lawfully have dammed it, therefore Mr. Leovy could not."

10th. Said court erred in instructing the jury, as follows, to-wit: "What is a navigable water of the United States? It is a navigable water, which, either of itself, or in connection with other water, permits a continuous journey to

another State. If a stream is navigable, and from that stream you can make a journey by water, by boat, by one of the principal methods used in ordinary commerce, to another State from the State in which you start on your journey, that is a navigable water of the United States. It is so called, in contradistinction to waters which arise and come to an end within the boundaries of the State. * * * But if from the water in one State you can travel by water continuously to another State, and the water is a navigable water, then it is a navigable stream of the United States. * * * If it was navigable and connected with waters that permitted a journey to another State, then it is a navigable water of the United States. In this case, if it was navigable, it would be a navigable water of the United States, or might be so in two ways; by connecting with the water of the Mississippi. I mean to say, that if there is evidence here, that you could leave the Mississippi and go into the Jump, and then go to the place where this dam was built by Robert S. Leovy, and some distance beyond that, and that it was navigable for boats or vessels carrying on commerce, then it would be a navigable water of the United States because it would connect with the Mississippi, you could go to the other States of the Union. I say again, that it might connect in another way. It might connect through the Gulf. But the fact that I wish to impress upon you is this, that it is not absolutely necessary that you should find that there was navigability all the way from the Jump out to the Gulf, because if from some point beyond the place, where Mr. Robert S. Leovy built this dam, towards the Mississippi River, the stream was navigable, then it would be a navigable stream of the United States, because it would connect with the Mississippi River."

11th. Said court erred in rendering sentence and judgment herein against this defendant on the verdict of the jury herein, as the same is of record, because there was no penalty imposed by law for the offense charged in said indictment, of which this defendant was convicted.

Wherefore, by reason of the premises, and for the errors assigned, and others manifest upon the face of the record, said Robert S. Leovy prays that said judgment and sentence may be reversed and set aside, and that he be discharged from the premises, and go hence without day.

(Signed) H. J. Leovy,
Rouse & Grant,
Attorneys for R. S. Leovy, Defendant.

Petitioner alleges that there is error in affirming the decision of said Circuit Court in each and all of said specifications.

This case, it is confidently believed, is one for the consideration and control of this Honorable Court. The record shows the case to be one of grave importance both in its immediate effect and in its far-reaching consequences.

1. It involves the construction of Section 8, Article 1, of the United States Constitution, and the Tenth Amendment to the United States Constitution, involving the construction of the power of Congress to regulate commerce as affected by the reserved police power of the State in matters pertaining to the preservation of property and health.

2. It requires the construction of the Acts of Congress of 1849 and 1850, granting swamp lands to the States for the express purpose of draining and reclaiming them, and the implied permission therein contained to close small crevasses and streams, without which the power granted is nugatory.

3. It requires a decision as to the powers of the States in relation to building levees, and, incidentally thereto, to close insignificant streams.

4. It involves a definition of the power of the States to regulate streams wholly within their limits, whether con-

necting or not with other streams within the police power of the State.

The above points are of grave public nature, as they affect the swamp lands in California, Louisiana and other States, aggregating immense tracts, greatly affecting their owners, who have been improving them, and the value of large tracts yet unsold by the States.

5. The case also involves the question as to the legal definition of the words "navigable stream." The evidence shows that Red Pass had been closed by silt from the Mississippi, for many years; that small oysterboats were compelled to use a branch of it known as Tonfine Pass, so small as to be traced for only a short distance on the government maps; that in Tonfine Pass there was at the mouth and on the mud flats for a great distance beyond, only about two feet of water; that there had never been any commerce through it, and that while it was useless for navigation, the lands in the vicinity were extremely valuable for agricultural purposes if the Pass were closed, but useless if it were kept open. It was further shown that even the occasional oysterboats passing through the Pass were compelled, by its shallowness, to return through other bayous and marsh streams with their loads; and that by the placing of the bar they were compelled to make only an insignificant detour in their outward trips.

The immediate disastrous effects of the opening of Red Pass would be to destroy the drainage of thousands of acres of land; to ruin orchards and farms of great value; to deleteriously affect the health of the people of the lower part of the parish by converting well-drained fields into miasmatic marshes; and to destroy a part of the levee

built by the Levee Board to prevent the flow of water behind the upper levees. This is proved by the testimony of of the President of the Police Jury; of a member of the State Levee Board; of the ex-President of the local Levee Board and of others, *and is uncontradicted.*

Wherefore, and for the reasons more fully discussed in the brief herewith filed and supported by the authorities therein cited, petitioner prays that this Honorable Court will be pleased to grant a writ of *certiorari* in this case to the United States Circuit Court of Appeals for the Fifth Circuit, to bring up the writ in this case to his Honorable Court for such proceedings as shall be proper and just, and for such other and further relief and redress as to right and justice shall seem proper and as the Court is competent to give in the premises.

HENRY J. LEOVY,
VICTOR LEOVY,
Attorneys for Petitioner.

Robert S. Leovy, being duly sworn, deposes and says that he has read the foregoing petition, and that the same is true to deponent's knowledge, information and belief, and his knowledge is derived from familiarity with the facts therein stated.

Sworn to and subscribed before me at .....

this..... day of ..... A. D. 1899.

I hereby certify that I have examined the foregoing petition, and, in my opinion, said petition is well founded, and that the case is one in which the prayer of the petition should be granted.

Attorney for Petitioner.

238

No. 746.

Brf. of Leovy, Leovy & Morse for

Office Supreme Court U. S.
FILED
APR 3 1899
JAMES H. McKENNEY,
Clerk.

Filed Apr. 3, 1899.

SUPREME COURT OF THE UNITED STATES.

..... TERM, 1899.

No. 746

ROBERT S. LEOVY, PETITIONER,

versus

THE UNITED STATES OF AMERICA.

Application for a Writ of Certiorari.

BRIEF FOR PETITIONER.

HENRY J. LEOVY,
VICTOR LEOVY,
Alexander Porter Morse, *Attorneys for Petitioner.*

Thomason, Print., 526 Natchez Street, N. O.

SUPREME COURT OF THE UNITED STATES.

..... TERM, 1899.

No. .....

ROBERT S. LEOVY, PETITIONER,

versus

THE UNITED STATES OF AMERICA, RESPONDENT.

BRIEF FOR PETITIONER ON APPLICATION FOR A WRIT OF CERTIORARI.

The annexed brief, which was prepared for the United States Circuit Court of Appeals for the Fifth Circuit, covers the points now before this Honorable Court. It is deemed, therefore, unnecessary to attempt to add anything to it.

Respectfully submitted,

HENRY J. LEOVY,

VICTOR LEOVY,

Attorneys for Petitioner.

UNITED STATES CIRCUIT COURT OF APPEALS

FIFTH CIRCUIT.

No. 745.

ROBERT S. LEOVY, PLAINTIFF IN ERROR,

versus

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

STATEMENT.

In about the year 1836 the Mississippi River broke through its banks a few miles above Southwest Pass, at a point known as Gilbert's Canal. Thereafter, up to this time, its waters have, through this crevasse, overflowed the back country, and has made for itself through the marshes several small passes, known as Grand, Tiger, Williams, Spanish, and Red Passes; all, except Grand Pass, being tortuous and insignificant streams, extending from the river through a wide waste of sea marsh to the Gulf; some ten miles distant. At these outlets, even when the streams reach the Gulf, mud flats stretch for several miles, covered by about two feet of water at mean tide. These facts are shown by the United States charts on file.

The result of the annual overflow of the river has been the building up, by deposit of silt, of swamp lands where before was only a sea marsh. A description of these lands

and of the process by which they were made will be found in the testimony of Mr. E. L. Corthell, an expert of national reputation; and Eads' principal assistant in the construction of the Jetties, incorporated in the report of case of State vs. Buck et als., in 46 La. An. p. 673; a suit among claimants of this land which engendered bitter feelings, believed to be the foundation of the present suit. (Rec. p. 23).

In 1849 (9 Stat. at Large, p. 353), Congress granted to the State of Louisiana all the swamp land within the State, in an Act entitled "An Act to aid the State of Louisiana in draining the swamp land therein." The first paragraph of this Act reads: "To aid the State of Louisiana in constructing the necessary drains to redeem the swamp and overflowed land therein," the said swamp lands are hereby donated, etc. In 1850 similar grants were made to other States. And the United States Supreme Court has said that the grant of the lands was "to enable them to *construct the necessary levees and drains* to redeem them." (142 U. S. p. 185).

The State sold to many persons large tracts of this land, some of whom improved them at heavy expense, and others bought, with a view to extensive improvements.

The first step toward the drainage and redemption of these lands was the closing of Spanish Pass in the year 1888. This was done on the petition of property holders; no objection was made and a large tract of land was redeemed and improved. (Rec. pp. 47, 88, 99).

Red Pass remained open, and during high stages of water in the river, it was filled and its banks overflowed for several miles, not only preventing the drainage of that part of the land, but flooding the country for miles above it, *extending*

behind the levees built at great expense *and rendering them useless.* (Rec. pp. 79, 80, 82, 83, 101).

In 1890 some two hundred residents of the vicinity applied to the Police Jury to close this stream. The following is a copy of the resolution of the Police Jury passed in accordance with this petition:

"On motion of Mr. Schoenberger, duly seconded, that the syndic of the 5th ward be authorized to have Red Pass closed, provided property owners are favorable to the closing of said Pass and pay all costs on said work." (Rec. p. 118).

In 1895 Robert S. Leovy was syndic, the officer on whom was imposed the duty of carrying out this work when the property owners were prepared to pay for it. (Rec. p. 119). Finding the property owners both willing to pay the cost and anxious to have the work done, acting officially and under the authority vested in him by the Police Jury, the Pass was closed, as Spanish Pass adjoining it had been under precisely similar circumstances.

Red Pass was a shallow, narrow stream passing through the marsh for some ten miles, and finally emptying in the mud flats on the border of the Gulf, where the average depth was only two feet. One branch had been closed many years, and the few luggers that took oysters to the Gulf for planting or "bedding" always used a branch called Tonfine Pass, so small that on the government charts filed it appears *as lost in the marshes.* No commerce is shown anywhere to have passed over it; nor has it ever conveyed a passenger. Its solé use, and that extremely limited, was for the conveyance of small loads of oysters taken from one bed on one side of the river to be planted

on the other side. Two other streams may be used and were used for the identical purpose, Tiger Pass and Grand Pass, as shown by maps and the testimony. By their use the identical spots may be reached by a slightly lengthened journey. Tiger Pass being one mile distant and deeper and wider. No commerce is destroyed; and this transplanting of oysters may be carried on between precisely the same beds as before the erection of the levee complained of. See testimony of four witnesses, Rec. pp. 63, 71, 79, 94. In other words, these transactions are subjected, for the preservation of the health of the parish and the reclamation of its lands, and their protection from floods, to infinitely less inconvenience than real and important interstate commerce frequently undergoes through other branches of the State's police power, quarantine, inspection, etc.

As to commerce with the banks of the Red Pass, beyond the levee complained of, there is no suggestion that a boat had ever landed there.

These Passes, it must be borne in mind, were in no case natural rivers, but are the outflow of water from the river, through a crevasse left open for years because the condition of the lands, until filled by deposits, did not justify the expense.

In November, 1897, the Police Jury approved the action of their syndic and ratified his action. The following is the resolution (Rec. p. 119):

"Whereas, the Police Jury of the Parish of Plaquemines adopted a resolution on July 1st, 1890, authorizing and directing the closing of Red Pass, a part of the jump, an old crevasse of the Mississippi River, and pursuant thereto Robert S. Leovy, the syndic of the fifth ward of said parish,

did close the same, and the closing thereof has reclaimed large tracts of worthless sea marsh and made it valuable and taxable land, and, by drainage, has improved the health of the district and improved all the land near the Mississippi front; and

"Whereas, since the closing of said Red Pass great improvements have been made on the land adjoining the Pass and many orchards have been built up which will be damaged by the opening of Red Pass; and

"Whereas, the Levee Board of this district has made the new bank a part of the Levee District by resolution passed November 20th, 1897, and protested against the opening of Red Pass;

"*Be it Resolved*, That this Board hereby ratifies and approves the act of said Robert S. Leovy, Syndic, in closing said Red Pass, and unites with the Buras Levee Board in protesting against the opening thereof, and requests the Attorney of the Board to take such steps as in his judgment may be necessary to prevent said Pass from being opened."

The Levee Board adopted the levee thus made as *part of the Levee System* and joined it to the levee made by the State. (Rec. p. 82). They also passed a resolution substantially to the same effect as that just recited. (Rec. p. 8).

For this official action, taken upon a numerously signed petition, authorized and ratified by the only boards having the authority to protect their people from disastrous floods and carry out the purpose of the congressional grant, there being no shadow of any claim of malice or ill will in the official act, and there having been a unanimous decision of the State Supreme Court in favor of the power, and not the slightest protest at the time, Mr. R. S. Leovy, the syndic of his ward, was indicted nearly three years afterward; long after the old pass had presumably grown up in willows

and after part of the reclaimed swamps had become valuable young orchards and truck farms.

The area of land affected by the issues in this case extends to three whole townships, or about 100,000 acres of land. While this suit apparently covers only the question of the guilt of the defendant, it involves, therefore, questions of great importance. The main question is, whether the immense areas involved shall be kept worthless swamps in order that a few oystermen may be saved a slight deviation in their voyages from oyster bed to oyster bed; or whether the lands were rightfully made valuable, the expressed purpose of Congress rightfully carried out, the citizens of the Parish rightfully protected in their health and property from disastrous floods, by the exercise of the State's police power; a power never expressly mentioned in any Federal statute, but impliedly included in all.

ASSIGNMENT OF ERRORS.

Filed June 16, 1898.

United States Circuit Court, Eastern District of Louisiana.

The United States
vs. } No. 2245, C. D.
Augustus F. Leovy and Robert S. Leovy.

And now comes Robert S. Leovy, one of the defendants in this case, and makes and files with his petition for writ of error herein, the following assignments of error:

1st. Said Court erred in sustaining the objection made by the United States Attorney to the introduction in evidence upon the trial of this cause, the resolution adopted by the Board of Commissioners of the Buras Levee District, and in refusing to permit the same to be read in evidence, a copy of which is annexed to and made a part of this bill of exception No. 1.

2d. Said Court erred in refusing to instruct the jury,

as requested by this defendant, as follows, to-wit:—"That upon consideration of the whole evidence adduced upon the trial of the case, the Court direct the jury to acquit the defendants."

3d. Said Court erred in refusing to instruct the jury, as requested by said defendant, as follows, to-wit:—"If the jury shall find that Red Pass is not a natural stream, but simply the result of a crevasse, or outbreak of the Mississippi River from its natural channel, they must acquit the defendants."

4th. Said Court erred in refusing to instruct the jury, as requested by the defendants, as follows, to-wit:—"If the jury shall find that Red Pass was a crevasse, or outbreak, of the Mississippi River from its natural channel, the result of which was to overflow a large portion of Plaquemine Parish to the detriment of the inhabitants thereof, by the destruction of their property, and prejudicial to their health, the State, in the exercise of its police power, delegated to the Police Jury of the Parish of Plaquemine, had a right to close it."

5th. Said Court erred in refusing to instruct the jury, as requested by the defendant, as follows, to-wit:—"If the jury shall find that Red Pass is a crevasse, or outbreak, of the Mississippi River from its natural channel, and overflowed the lands situated on the banks of Red Pass, and that its closing was necessary to reclaim, drain, or levee said lands, or any of them, then it was the duty of the State, under the Acts of Congress of 1849 and 1850, to close Red Pass."

6th. Said Court erred in refusing to instruct the jury, as requested by the defendants, as follows, to-wit:—"Unless the jury shall be satisfied, from the evidence, that Red Pass was, at the time when it was closed, as alleged in the indictment, substantially useful to some purpose of interstate commerce, the jury are instructed that any Federal legislation, purporting to prohibit, or prevent, or interfere with the closing of said stream, would be beyond the powers granted to the Congress by Art. I, Sec. 9, of the Constitution, or otherwise vested by the Constitution of the United

States in Congress, and would be contrary to Amendment 10 of the Constitution of the United States. And the jury are instructed that the defendants claiming and being entitled to the protection of that Constitution must be acquitted."

7th. Said Court erred in refusing to instruct the jury, as requested by the defendants, as follows, to-wit:—"If the jury shall find that the dam constructed at the mouth of Red Pass, was constructed by authority of the Police Jury of the Parish of Plaquemine, and that the defendant, Robert S. Leovy, was an officer of said Parish, and, in constructing said dam, was acting as such under authority of the Police Jury thereof, they must acquit him."

8th. Said Court erred in giving the following instruction to the jury:—"I wish also to say, that the question whether, some 60 years ago, the Jump resulted from the enlargement of some canal which was then in existence, and has been contended here was a crevasse in that sense of the word, you are not to consider at all. As you have been appealed to in the argument to consider that this question involved the right of the State to close a gap in its levees, I say that you have nothing of that sort to consider. I repeat to you, that whether or not 60 years ago the Jump was formed in the manner in which it was contended it was is not a matter for your consideration."

9th. Said Court erred in instructing the jury as follows, to-wit:—"I charge, you gentlemen, that the Police Jury of the Parish had no right to authorize Mr. Robert S. Leovy to dam Red Pass, if Red Pass was a navigable water of the United States. I say that it had no authority, because in the year 1890, the Congress of the United States passed the law under which this indictment has been brought, forbidding the damming of any navigable stream of the United States, without the previous authorization of the Secretary of War. Therefore, as it was not contended in this case that there was any authority from the Secretary, but on the contrary, there is proof tending to show there was no such authority, then it results, that it is no defense for Mr. Robert S. Leovy to show his pretended or alleged

authority from the Police Jury of the Parish of Plaquemine. The Police Jury of the Parish of Plaquemine could not lawfully have dammed it, therefore Mr. Leovy could not."

10. Said Court erred in instructing the jury as follows, to-wit:—"What is a navigable water of the United States? It is a navigable water, which, either of itself, or in connection with other water, permits a continuous journey to another State. If a stream is navigable, and from that stream you can make a journey by water, by boat, by one of the principal methods used in ordinary commerce, to another State from the State in which you start on your journey, that is a navigable water of the United States. It is so called, in contradistinction to waters which arise and come to an end within the boundaries of the State. * * * But if from the water in one State you can travel by water continuously to another State, and the water is a navigable water, then it is a navigable stream of the United States. * * * If it was navigable and connected with waters that permitted a journey to another State, then it is a navigable water of the United States. In this case, if it was navigable, it would be a navigable water of the United States, or might be so in two ways; by connecting with the water of the Mississippi. I mean to say, that if there is evidence here, that you could leave the Mississippi and go into the Jump, and then go to the place where this dam was built by Robert S. Leovy, and some distance beyond that and that it was navigable for boats or vessels carrying on commerce, then it would be a navigable water of the United States, because it would connect with the Mississippi, you could go to the other States of the Union. I say again, that it might connect in another way. It might connect through the Gulf. But the fact that I wish to impress upon you is this, that it is not absolutely necessary that you should find that there was navigability all the way from the Jump out to the Gulf, because if from some point beyond the place, where Mr. Robert S. Leovy built this dam, towards the Mississippi River, the stream was navigable, then it would be a navigable stream of the United

States, because it would connect with the Mississippi River."

11th. Said court erred in rendering sentence and judgment herein against this defendant on the verdict of the jury herein, as the same is of record, because there was no penalty imposed by law for the offense charged in said indictment, of which this defendant was convicted.

Wherefore, by reason of the premises, and for the errors assigned, and others manifest upon the face of the record, said Robert S. Leovy prays that said judgment and sentence may be reversed and set aside, and that he be discharged from the premises, and go hence without day.

(Signed) H. J. LEOVY,
ROUSE & GRANT,
Attorneys for R. S. Leovy, Defendant.

EVIDENCE.

1. The map of the State, filed with the transcript, issued by the Commissioner of the State Land Office, shows the character and extent of the land drained by Red Pass. It also shows the other small, shallow streams running through the marshes. (R. p. 120).

2. The U. S. Coast Surveys. Two maps (pp. 117 and 118). These charts show Red Pass and its relation to Tiger and other shallow marsh streams. One of these maps shows the depth of water on the *mud flat* at the mouth of Red Pass, extending for about three miles from its end. That depth, as shown on the chart, is about two feet. The parol testimony must be taken with reference to these official charts. (R. p. 20). Especially is this true of the absurd statements of some of the witnesses as to the greater distance by way of Tiger Pass. The official charts show how great these overestimates were, and discredit all the testimony of plaintiff witnesses in question. The distance

between the two Passes is about one mile at their mouths. (R. pp. 63, 71, 89, 94).

3. The survey of the lands, made by Connelly in 1836, showing that at that time the bank of the river where the Jump afterwards broke through was intact; and that, consequently, the Jump, at the time of the donation of the lands by the U. S. Government, for leveeing and drainage, was a recent crevasse. (R. p. 120). (These maps are filed with the papers).

4. Field notes of the said Connelly, showing that what is now the Jump was at that time a mere artificial opening for skiffs, a few feet wide. (R. p. 131).

5. Appointment of R. S. Leovy Syndic of the ward. (R. pp. 119, 81).

6. Resolution of the Police Jury of the Parish authorizing the syndic to close Red Pass. (R. p. 118).

7. Resolution of the Police Jury ratifying the act of R. S. Leovy, Syndic of the District, in closing Red Pass. (R. p. 119).

8. Resolutions of the Levee Board ratifying and affirming the resolutions of the Police Jury, and the act of R. S. Leovy. (R. p. 13). Exception to this document was sustained by the Court and bill reserved. (R. p. 8).

9. The levee placed across Red Pass is made part of the general levee system of Louisiana by the Levee Board. Testimony of Shoenberger, President. (R. p. 82).

10. Land Department map of Louisiana.

PAROL TESTIMONY.

1. As to the property affected by the floods from Red Pass.

The map of Louisiana, issued by the Commissioner of the Land Department, shows the character of the lands affected by the floods from Red Pass. It was swamp land and impassable sea marsh from the river to the Gulf. The testimony of Shoenberger, President of the Police Jury and of the Levee Board (R. p. 77), of Mr. Lewis, of the State Board of Engineers (R. p. 44), of Mr. Theodore Wilkinson, Ex.-President of Levee Board (R. p. 98), and of DeArmas, Inspector of the Levees (R. p. 56), shows the emergency in the district. The testimony shows conclusively that if Red Pass be now opened it will, by inundation and by closing the drainage, ruin the most valuable lands and farms in the State. *It will also prevent all future improvement of this whole district.* This testimony is of the very highest character and is uncontradicted by a single witness. We invite attention to the whole testimony of Mr. Shoenberger (R. pp. 79, 83), Lewis (R. p. 48), Wilkinson (R. p. 101). We quote the following from the testimony of Mr. Shoenberger, President of the Levee Board (R. p. 83):

"Well, we have got it drained for 15 miles on the river, giving us splendid drainage. The property in the 5th ward, before those two passes were shut was valued at about $5000; to-day it is valued at $100,000, and if the passes are not opened for five years more it will be three times as much. *If the pass is opened again, it will be all ruined.*

"Q. Are the people of the Parish making any opposition to the closing of this Pass? A. No, sir, only the fishermen. Q. Have there been any improvements made at the jump in building up orange orchards? A. Yes, sir. Q. Have you planted your orchard any further back from the Mississippi since this pass was closed up? A. Yes, sir, I think you can plant it to twice the depth. Q. You have stated these lands are very valuable, these orange orchards; state to the jury why these lands are so very valuable? A.

Well, if a man attends to an orchard, it brings him an income; I have two arpents front a mile below and I was offered $6000 for them; but this year it will bring me $3000 *earnings;* it is two arpents front and three deep. Q. That is, six arpents? A. Yes, sir. Q. You netted $6000 on them? A. I could sell the land to Mr. Socola, but it will bring me in an income of $3000 to $6000 regularly." (R. p. 83).

Mr. Lewis said on this subject:

"Q. From Buras down to the Jump, what is the character of the country along the Mississippi River? A. Well, I judge for about six acres inward, on an average, it is a fine country for orchards, *the finest in the State.* Q. That goes down to the Jump? A. Right down to the Jump." (R. p. 48).

He also added:

"From Fort Jackson down it would be to the interest of the people who have property in that neighborhood, to have the Red Pass and all the outlets down there closed; that is what *they need for proper drainage.*"

And on page 49:

"They are valuable, principally for orange and fruit culture, especially orange culture. There are some orange orchards, I do not know how many of them, but there are many valuable orange orchards below Fort Jackson since the building of the levee, in 1888, and previous to that there was nothing but a palmetto swamp and grazing lands. * * From Buras to Fort Jackson it is five miles, and then there are three miles of very fine orchards below; there would have been a great deal more if there was better drainage."

And he states (on p. 48) that the closing of Red Pass not only prevents overflow, but drains the country all around.

2. As to the character of the Pass.

The Jump Pass and its subdivisions (including Red

Pass) are simply a crevasse, similar in all respects to numerous crevasses closed by this and other States for protection against floods. It was not closed earlier because, prior to about 1880, the river was not leveed, and it would have been idle to place levees across these crevasses. The breaking through the river bank at Gilbert's Canal was a recent crevasse at the time of the donation of the lands by Congress, for the express purpose of leveeing and draining the swamp lands, and for that purpose there was no limit of time in the grant. The country above Red Pass is now leveed by the State, and the levee now in controversy is now part of the system.

We ask attention to the testimony of Sidney Lewis, State Engineer (p. 46), and of Mr. Shoenberger, President of the Parish Levee Board (p. 78), and of Mr. Theodore Wilkinson, ex-President (p. 100), as to this matter of State action in closing crevasses.

Mr. Lewis repeats several times that the Jump was not a natural stream, but simply a crevasse like those which the Levee Board often closed. Mr. Schoenberger says the same thing and enumerates several similar crevasses his Board had closed. Mr. Wilkinson said (p. 100) that the Jump was not in the nature of an ordinary stream, but "only a crevasse, a break in the banks of the river, in which the water broke through and carried deposits of land which filled up here and there and *left a number of shifting channels to the sea;* by the water flowing through deposits, and that it was thus the building up of the land that made the passes. Spanish Pass was stopped up by the State Engineers and nobody ever made an objection to it; on the contrary, the whole community hailed it with delight."

Asked what would be the effect on the prosperity of the State if it were without power to close crevasses, he said (p. 101) that "it would be uninhabitable." Asked if a levee were constructed on the river bank and a pass like Red Pass left open, permitting the water to get behind the levees, what the effect would be, he said, "I would answer that by saying it would be useless. It would be impaired, if not wholly destroyed." (R. p. 101).

3. Not only was Red Pass a mere crevasse and not a natural stream, in the sense of the statute and as construed by the States from time immemorial, but neither by size nor importance was it entitled to the designation of a navigable stream. The question as to what is a navigable stream is one of law and fact. We now ask attention to the question of fact.

In reviewing the evidence on this point, we beg to suggest that much labor will be saved by consulting the coast surveys and the land office map of Louisiana rather than the parol testimony, with respect to the location of the Passes and the character of the country surrounding them. It will then be seen that the opening from the river is quite a broad stream which is called the "Jump;" and that about a half mile from the Jump is a branch of it called Red Pass; and at about a mile from the head of Red Pass is Tonfine Pass (not even named on the U. S. Coast Surveys, and by them ending in the sea marsh some distance from the Gulf).

Three things the evidence shows, which accord moreover with the evidence of Corthell, the expert, to be found in 46th An. 673 (offered in evidence by the Government): First, that for many years all these Passes have been stead-

ily growing shallower and narrower, so that at the time of the closing Red Pass few of the smallest crafts attempted to pass through it. (R. pp. 53, 70, 94). Second. That Red Pass itself had closed entirely some distance from the Gulf, and all the small oyster boats that passed through were compelled to use Tonfine Pass. Third. That, though in some places there is deep water, both Red Pass and Tonfine Pass became narrower and shallower and emptied into mud flats at some distance from the Gulf. At their mouths and for three miles out, according to no standard fixed by the courts, is the water navigable.

It would occupy too much space in this brief to sift the testimony of the witnesses. We think that, on the whole, the Court will see that according to the legal definitions, to which we shall refer, Red Pass was not a navigable stream. Such streams abound in the whole of Southern Louisiana and meander in every direction through vast tracts of the swamp land donated by the Government for drainage and reclamation.

One point is made entirely clear by the evidence, and that is, that absolutely no commerce was ever carried on with the banks of Red Pass, which were, *at the time*, an uninhabited swamp; and it is further clear that no commerce, in any legal or reasonable sense, was ever carried on through the Pass to points beyond it; while it is shown by all the testimony that much of the land can be, and has been made valuable, by drainage, for habitation, and the growth of fruits and other agricultural products; the country thus becoming much more useful in the production of commerce than if occasionally used by small boats for the carrying of oysters for planting purposes; especially when

it is remembered that the result of the damming is not a destruction of the means of transit, but a slight inconvenience. *It is not shown that a single passenger ever was carried through Red Pass; nor a single load of freight destined to any other State than Louisiana, nor indeed a single load destined for any market in Louisiana.* The luggers when loaded with oysters for sale always took other channels. They could not come through Red or Tonfine Pass. (Blaise, pp. 71, 72, 73, 76; Buras, pp. 89, 90, 93; Gibbs, p. 95). The sole use was for carrying in small luggers of oysters from one oyster bed to another (R. pp. 73, 89, 91); a business that can hardly be considered commerce; and it is difficult to understand how, originating and ending in the same State and relating solely to the transplanting of oysters within the State (an industry entirely, as is well settled, under the absolute control of the State), this oyster planting can be considered interstate commerce.

It will also be borne in mind, that even this oyster planting business can be, and has been carried on equally as well through Tiger Pass. The testimony of many witnesses for the defense shows that Tiger Pass is at its mouth only one mile distant from Red Pass, and is as deep and wide. (Record, pp. 63, 71, 89, 94).

Special attention is asked to the testimony relative to the depth of water at and beyond the mouths of Red Pass and Tonfine Pass. Nearly all the witnesses for the Government were oystermen. Their testimony is contradictory in most respects, but shows that Red Pass proper was closed years ago; that Tonfine Pass (a branch of Red Pass) was used in its stead; that sometimes the water at the bar was very low, and that even skiffs had to wait for the Gulf tide;

and that at most there was only about three feet of water over the mud flats. On the other hand, De Armas, the Levee Inspector, who was born and lived all his life near the Pass, testified that there was only a few inches of water on the bar, increased one or two feet at high tide (R. p. 57 *et seq.*) Oxford, the pilot, testified as to ten or twelve inches; that the greatest depth was eighteen inches (R. p. 67). Blaise, who lived near the Jump twenty-eight years, speaks of only four inches at low tide (R. p. 72). Buras, who lived near the Jump, who is a luggerman, swears that when he was in Tonfine Pass last (*six weeks before the closing*) the depth was hardly four inches (R. p. 87); and that the Pass was only from 25 to 30 feet wide (R. p. 93). Gibbs, an oysterman, says he passed five times with a boat drawing 18 inches, and had great trouble to get over the flats every time (R. pp. 94, 95). Stoulich, trapper and fisherman, lived near the Jump five years. The last time he passed through Tonfine Pass, five years before the closing, the flats were nearly dry; not more than four inches of water outside the bar. The deepest water was a foot and a half (R. p. 103). He says that in some places the width of the Pass was about fifteen or twenty feet, from bank to bank. It may have been wider (R. pp. 107, 108).

Taking all this testimony of disinterested witnesses together with the official maps and the character and limited use of this crevasse branch, we think that there can be no doubt that in no sense was Red (or Tonfine) Pass a navigable stream of the United States.

ARGUMENT.

1st. As to the assignment of error No. 1. Defendant

offered in evidence a resolution of the Levee Board showing that the closing of Red Pass had drained and redeemed land and protesting against the opening of the Pass because of the disastrous results that would ensue. The only objection was its irrelevancy. We contend that as the Pass was closed to prevent overflow of the land, that the evidence is relevant. (See Rec. pp. 8, 13).

2d. Under the second assignment. The whole evidence shows that the defendant was not guilty.

3d. Under the third and eighth assignments:

The Act under which defendant was indicted, referring to "navigable waters of the United States," clearly relates to natural and permanent streams and not to those caused by the breaking of river banks or levees. The action of all the States bordering on navigable streams from time immemorial and the construction placed on their police power in such matters and the necessity of preventing disastrous consequences to life and property, conclusively show that the narrow construction placed by the Circuit Court on the words of the Statute is unwarranted by experience or precedent. The testimony of the three experts in the case, Lewis, the State Engineer, Shoenberger, the President of the Levee Board, and Wilkinson, for many years President of the Levee Board, shows that before and since the passage of the Act of 1890 the State authorities have not hesitated to close crevasses when necessary, without regard to their depth. Mr. Wilkinson said, as we have seen, that if the State had not the power to close crevasses "it would be uninhabitable," "the statement would be preposterous that they had not the power to close it." (R. p. 101). His Honor, the Circuit Judge,

said, in substance, that if a stream caused by a crevasse from an interstate river, extended back two or three miles, and was navigable to that extent, it was a navigable stream of the United States within the meaning of the Statute. This definition would include very many crevasses, because the water from many of them is deep, and, if not closed at once, they remain deep for some time. We discuss the subject further under the head of the police powers of the State.

That Red Pass was created by a crevasse is proved beyond doubt. It was a recent crevasse when the lands were donated by Congress to be leveed; and the double power to close it has remained in abeyance for so many years because no interest required that it should be closed, and the lands were not yet greatly improved in its vicinity prior to the year 1890.

Under the Fourth, Seventh and Ninth Assignments of Error:

The error, of which we here complain, is one of extreme importance. It involves the question of the reserved power of the State to protect itself from damage to property, health and life. It has been the subject of discussion ever since the foundation of the Government. There has never been a question as to the *existence* of the power; but concerning the legality of particular acts done in exercise of that power many decisions have been written.

The charge complained of, we submit, with all due respect to the Circuit Judge, goes farther than any decision of which we have any knowledge. It utterly ignores the existence of any police power whatever, where not found (and it is never so found) expressly excepted in the words

of Federal Statutes. It denies the existence of any power in the State, through any instrumentality, whether it be the Governor, authorized by Legislative Act, or the humbler municipal corporations, to dam outbreaks of a river, though such crevasse may carry destruction to the property, health and lives of the people confiding in the protection of these authorities. And the Court apparently deemed this great power destroyed or non-existent because, like quarantine, license and many other branches of the police power, it was not expressly referred to in the statute.

It is proved by the testimony, that the closing of Red Pass was done to drain and reclaim vast tracts of sea marsh donated to the State for that purpose; to prevent inundations in times of high water; and to prevent disease resulting from the existence of vast malarial marshes in the immediate vicinity of an inhabited district. It was shown that this was done by authority of the Police Jury, invested by law with the power; and that this action was subsequently approved by both the Police Jury and the Levee Board. The Levee Board adopted the levee thus made across Red Pass as a part of the general levee system of the State. (R. p. 82). All this action on the part of the State authorities was not only under the ordinary police power, but in pursuance of the terms of the congressional grant.

The reserved "police power" of the State is well defined in the early case of Tharp vs. Rutland R. R. Co. (27 Vermont 149). "It extends to the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the State." This definition is adopted by the U. S. Supreme Court in R. R. Co. vs.

Husen, 95 U. S., p. 471, and in 16 Wallace, p. 62, and by Judge Cooley, in his work on "Constitutional Limitations." (P. 715). That this police power was originally reserved by the States, and is essential to their protection, has been frequently decided by the highest authority. In the case above referred to (95 U. S., p. 471) the Court said:

"We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may be properly denominated police power."

"While for the purpose of self-protection it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the States *beyond what is absolutely necessary for its self-protection.*"

Surely the right to close crevasses, denied by the Court *a qua*, to prevent the inundation of the country and protect the property, health, and sometimes life of the people, must come within the exception stated.

In both the cases of Henderson vs. N. Y., 92 U. S., p. 259, and Lung vs. Freeman, 92 U. S. p. 275, the decisions were based, not on the non-existence of the police power, but on the fact that the acts in question transcended that power and "went beyond their professed purpose." "The police power of a State cannot obstruct foreign commerce beyond *the necessity for its exercise*" is the language of the opinion in R. R. Co. vs. Husen, 95 U. S. pp. 472, 473. (Italics ours).

Judge Cooley, in his work on Constitutional Limitations, adopts, as we have seen, the definition of the Police Power, as laid down in the Vermont case, and adds:

"In the American constitutional system, the police power has been left with the individual States and cannot be

taken from them, either wholly or in part, and exercised under legislation by Congress." (Page 715).

The case of Lawton vs. Steele, 152 U. S. p. 133 (decided in 1893), decides two issues in this case. It declares that Lake Ontario "is unquestionably within the jurisdiction of the State of New York," and it also declares that the police power is "universally conceded to include everything essential to the public safety, health and morals." (P. 136).

"The State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the Legislature, not only what the public interest requires, but what measures are necessary for the protection of such interests." For support of its opinion the Court refers to Barbier vs. Connelly, 113 U. S. p. 27, which is directly in point, not only because it supports our contention as to the doctrine of police power, but in its *application to the draining of sea marshes.*

The Court said:

"Neither the Fourteenth Amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its 'police power,' to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character having those objects in view, *must* often be had in certain districts, *such as for draining marshes* and irrigating arid plains." (Italics ours).

No case could be more applicable to any issue of law than that of Withers vs. Buckley (20 Howard, p. 87). In that case the Legislature of Mississippi, for reasons stated in the decision, closed "Old River," which had long been used for navigation. Its action was attacked on the ground that it violated an Act of Congress. Among other things

the Court said (p. 92): "The Act of Congress of March 1st, 1817, in prescribing the free navigation of the Mississippi and navigable waters flowing into this river, could not have been designed to inhibit the power, *inseparable from every sovereign or efficient government*, to devise and to execute measures for the improvement of the State, although such measures might induce or render necessary changes in the channels or courses of rivers within the interior of the State, etc."

And again (on p. 93):

"*It cannot be imputed to Congress* that they ever designed to forbid, or to withhold from the State of Mississippi, the power of improving the interior of that State, by means either of roads or canals, or *or by regulating the rivers within its territorial limits, although a plan of improvement to be adopted might embrace or affect the course or the flow of rivers situated within the interior of the State.* Could such an intention be ascribed to Congress, the right to enforce it may be confidently denied." (Italics ours).

We do not think this Court will find it necessary in this case to decide the much contested question as to what would happen in case of direct and irreconcilable conflict between the national legislation and the police power. There is nothing in the Act of Congress covering this case which could bring about such an unfortunate situation. The contention that the mere fact that its terms are general, and make no express exception of acts done under the police power is conclusive upon the point, would, if correct, have saved the United States Supreme Court the labor of considering many of the most important problems ever solved by that tribunal. Little would have been said in quarantine, inspection, drainage, and a dozen other cases, if the Court had been concluded by the fact that, in Federal laws relating to interstate commerce, the mails, etc.,

there cannot be found exceptions as to the State's police acts. Nor will this Court, we submit, lightly conclude that Congress meant to limit and control, by mere inference from general terms, the exercise of the great and ancient power to construct levees; a power which has been always exercised by this and other States similarly situated; a *power absolutely necessary to its protection;* concerning which Mr. Wilkinson fitly said that its absence "would render the State uninhabitable."

The object of the Act was, in general, not entirely unlike that of Federal statutes relating to commerce by land. It was, to take under the control of the Federal Government the erection of structures in and over navigable streams, and making changes in their channels, for purposes of interstate commerce; and to prohibit individual interference with their usefulness; just as other Federal statutes take charge of interstate commerce by land, and regulate rates and charges, and prohibit conspiracies and combinations interfering therewith; just as still other statutes take charge of the mails and prohibit their obstruction. In none of these statutes is express exception made of the quarantine, inspection, levee or other police acts of the State.

In a few of the decisions the power of Congress has been said to be supreme in cases of unmistakable conflict. In others, as in Withers vs. Buckley, 20 Howard, 93, the U. S. Supreme Court said that the power of Congress to take away the police power of a State "may be confidently denied." But in nearly all the cases the Supreme Court has found a way out of the supposed dilemma by assuming that Congress has not designed to deprive the State of what is es-

sential for its protection. Indeed, in order that a conflict actually exist, the Court must find, first, that the action was one necessary for the well-being of the people; otherwise, it would not fall within the police power; and it must then find that Congress intended to prohibit such action. It is manifest that such cases can rarely exist; nor do we know of a case where it has been held that the conflict did actually exist.

This brief would be extended beyond reasonable limits were we to cite in support of our contentions the numerous decisions easily found in any digest. We cite only a few of the most directly applicable. The Court will bear in mind that in this case we have not only the exercise of police power under ordinary circumstances, but under also an express U. S. Statute authorizing the leveeing and drainage of these swamp lands. (See 142 U. S. 185).

1. The theory that the absence of an express exception of State police power concludes the matter and that police acts must be held to be included within the general terms of the prohibition, cannot, we submit, bear the slightest examination. We feel justified in so referring to this theory for the reason that Mr. Justice Fields, voicing the unanimous expression of the United States Supreme Court (in Mulligan vs. Corbin, 7th Wallace, p. 485), used equally emphatic language with relation to it. In that case there was a Federal Statute prohibiting, in general terms, without any exception, all obstructions and retardations of mail carriers. The State officer indicted, exercising his police powers, not only retarded a mail carrier, but put him in prison. Yet the United States Supreme Court unanimously upheld his action, saying, "All laws should receive

a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence." And as against the theory that general terms in such statutes are not susceptible of construction, but are determinative as against the police power, we refer, generally, to all the decisions of the U. S. Supreme Court in cases of quarantine and inspection laws. We know of no case where the mere existence of general prohibitive terms in a Federal statute has been held conclusive, except in the charge to the jury in this case. The true rule of construction is the determination by the circumstances of each case as it arises. See 114 U. S. 622; 140 U. S. 545, 554; 127 U. S. 678, 686; 97 U. S. 505.

2. Aside from the reluctance of the courts in this particular class of cases to infer an intention by Congress to control the exercise of the police power, it is a general canon of construction that well-known subjects of great importance are not included in general terms. We refer to Witham vs. City of New Orleans, 22 Sou. Rep. p. 38, where municipal officers are held not included in a State statute prohibiting the dumping of garbage in rivers; and to 42 Fed. Rep. 448, where it was held (in accordance with the well-known decision of the Commission) that the Interstate Commerce Act did not, under the term "carriers," mean to include express companies.

3. As against the theory that by this Act Congress meant to assume control of the policing of the rivers, by levees, etc., we call attention to the notorious fact that Congress has not assumed exclusively, or even generally, the duty of preventing floods; and that, on this assumption,

the State of Mississippi has lately submitted to a vote a proposed amendment to its Constitution. We call attention, further, to the tremendous labors that would be cast upon the Secretary of War under this construction of approving all levees in advance; and to the *delay thus resulting in closing crevasses;* and, on the other hand, to the dangers under which State officers would labor if they acted without his authorization.

4. We draw attention to the fact, that the levee branch of the police power comes under the language of the decisions in reference to cases where there has been no express legislation on a particular subject. The mere general words in the navigation statute do not fill this deficiency. Such general words exist in the statutes relating to interstate commerce, and to the mails; yet, it is generally conceded, that a special statute on the subject of quarantines is necessary to prevent interruptions by quarantine authorities.

5. The subject of levees is one of such importance that it is difficult fully to state it without danger of seeming to exaggerate. Many pages of State Statute books are occupied by Acts devoted to levees alone. They have *quasi* municipal corporations created, and collecting large revenues for their express benefit. They occupy a separate chapter in every Digest. Millions of dollars are annually spent on them. Yet, we are told, that they are meant to be included in a mere list of general words specific enough to mention "dolphins," but not specific enough to mention levees or any similar word; although, in Section 10 of the very same Statute, which concerns the much less important Federal levees, an amendment incorporating the word was made by a special act.

6. Nor, we submit, does the act in question amount to such a total destruction of commerce as to fall outside of the decisions permitting reasonable regulation and reasonable interference. The deviation of a mile forced upon the few oyster planters passing through this marsh stream is a much slighter interference with commerce than the frequent actions of local Boards of Health, tying up trans-continental commerce for months; stopping mails and disorganizing the postal service; holding a foreign steamer for days at the mouth of the Mississippi; and prohibiting, in many Southern ports, for entire seasons, all intercourse with many important foreign ports. Yet slight as was the enforced deviation in this case, it was not for that that the Police Jury was condemned. The charge of the Court was to the effect that the question of whether the crevasse stream was navigable through its mouth might be disregarded. It was because there was a physical possibility of commerce by water between the untrodden swamps lying below the levee, and States far distant, that the levee was held illegal. We respectfully submit that this construction does not follow the rule above quoted by us, that: "General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence."

We ask the Court to decide that (as was said of the Fourteenth and other Amendments, 133 U. S. 31; 140 U. S. 555) this Act was not designed to interfere with the power of the State to promote the peace, morals, education and good order of the people; and that from the very nature of the case State legislation of a special character having these objects in view must often be had in certain

districts "as for draining marshes;" that (as was said in Bowman vs. Ry. Co., 125 U. S. 465) cases of alleged conflict between the power of the States and the letter of Federal Statutes "must be determined according to the circumstances of each particular case." We need hardly refer to the infinitely more important interference with commerce in the case of the Rio Grande (51 Fed. Rep. p. 674) or in many cases of booms, etc. We think that, without referring to particular precedents, this Court will have little difficulty in concluding that it was a reasonable exercise of the police power of the State of Louisiana to close this old crevasse, even though its closing might theoretically interfere with a physically possible but practically non-existent and practically impossible commerce by water with the untrodden sea marsh forming its banks. Levees cannot, we submit, be torn down and orchards and gardens reconverted into pestilential swamps; parishes flooded, and their inhabitants reduced to poverty upon this forced construction, new to the experts who have testified and condemned by the United States Supreme Court. We respectfully refer to the old decision, cited in 7 Wallace, p. 785, that in spite of a statute against breaking jail, a prisoner "need not stay to be burned in order that he may be hanged." We submit, that the people of Plaquemines Parish need not stay to be drowned in order that they may more conveniently be reached by oyster boats.

The decisions of the State Supreme Court show that the power to regulate these small streams and bayous which run through every part of the State has been recognized for many years as necessary for redeeming large and valuable tracts of land. The case of Boylan vs. Shaffer (13 An. p.

131) is one of these. The Court said, in that case: "Were the mere fact that steamboat or flatboat had been a short distance up a stream or bayou in high water a sufficient ground for declaring it a navigable stream, every slight depression on the banks of the Mississippi would then become a navigable stream and should be opened for the benefit of rafts and boats and the convenience of a few persons, to the total destruction of the planting interests on the banks of the River. It is well known that the State has, for a number of years, been *closing the small bayous making out of the principal rivers and bayous, and thus redeeming large and valuable tracts of land.*" (Italics ours).

In the case of Egan vs. Hart (Judge Parlange being the organ of the Court, 45 An. p. 1358), it is said that the action of the Legislature would have been futile indeed if it had charged the "State Engineers with the great duty of protecting the alluvial part of the State from overflow but had taken from them the power to build levees across the bayous and sloughs." The Act of 1886 assumed, "as a matter of course, that the Board of State Engineers has this power." And the Court quotes a statute which authorizes the closing of bayous, etc.: "Besides, the bayou is wholly within the State and the State authority over it is complete." (This bayou emptied into Red River).

It will be borne in mind that at the time Red Pass was closed this was the adjudicated law of the State; and, for acting under it, the defendant has been found guilty and fined. In the case now before the Court, the Judge charged the jury that Red Pass, even if not navigable through to the Gulf was, if navigable, a stream of the United States, and not a stream wholly within the State. The case of Egan vs. Hart was reviewed by the United States Supreme Court. (165 U. S. p. 188). But the U. S. Supreme Court

held, that as it had been decided as a matter of fact that the bayou above the bar was not navigable, it need not discuss the questions of law. Both in this case and in that of Lake Shore vs. Michigan R. R., 165 U. S. p. 368, the U. S. Supreme Court expressly refused to decide whether the Act applied to streams passing through only one State, even if forming a chain with interstate streams; and in the latter case it is possible to surmise from the language of that Court that it leaned against such construction.

Assignment of Errors, No. 6:

We asked the Court, in substance, to instruct the jury that if Red Pass, when closed, was not substantially useful to some purpose of interstate commerce, Federal legislation on the subject was "beyond the power of Congress," referring to Article 1, Section 9, and Amendment 10 of the United States Constitution. As the Statute of 1890 was based on the power of Congress to regulate commerce among the States, it would seem clear that the soundness of the proposition was indisputable.

The Statute provides penalties for obstructing navigable waters of the United States. What is a navigable stream is a question of law and fact. As a question of fact we think the evidence is conclusive, that at the time of closing Red Pass, that stream was in no legal sense a navigable stream, useful for purposes of commerce.

The highest courts have defined the meaning of "navigable streams." A concise digest will be found in 16th Am. & Eng. Encyclopedia of Law, at page 241. It is there said that "in order that waters may be navigable in the legal sense, *commerce must be carried on over them which is of an essentially valuable character.*" Many decisions sup-

porting this definition are referred to in the foot note. Now, the evidence shows that no commerce whatever was carried on on Red Pass at the time when it was closed, nor was there any intercourse with other States that could be claimed as commerce in any sense whatever. The definition asked in the charge substantially corresponds to that quoted above, and we submit that it is elementary that if the defendant was protected by the United States Constitution (as he clearly was) from punishment for damming any stream not falling under the constitutional powers of Congress, and there being evidence to show that Red Pass was not such a stream, he was clearly entitled to have his constitutional protection stated to the jury. Without such charge, the jury was clearly not advised as to the fundamental law governing the case.

Assignment of Error No. 10:

We contend that Red Pass was essentially a stream wholly within the State and wholly within the jurisdiction of the State.

The main case relied on to establish the contrary is that of The Daniel Ball, 10 Wallace, p. 557, decided in 1870. But a close examination of the case does not bear out this construction. The case was one applying to a statute relative to licensing vessels, and it was decided that goods shipped in a vessel in Michigan and marked for another State were covered by the terms relating to commerce between the State, and were subject to the control of Congress, that a vessel receiving freight in one State destined for another State was an instrument of commerce, subject to the license laws of the United States. The case of The Montillo, decided at the same time (11 Wallace,

413), was based on the decision in the Daniel Ball case, and on the same point, as to licensing vessels.

The later decisions have been clearer as to the control of the State over streams wholly within the State, although connecting with others extending beyond it. We have seen that in the case of Egan vs. Hart, 44 An. p. 7, it was so decided by the Supreme Court of Louisiana. That case was appealed to the U. S. Supreme Court. The Court stated, but found it unnecessary to decide the point. And in another case in which the same point was raised, found in the same volume, that of Lake Shore R. R. Co. vs. Ohio, 165 U. S. p. 365, the Court again declined to decide the point, and the tenor of its language seems to be rather against the doctrine stated in the charge in this case. These very late cases certainly show that the U. S. Supreme Court by no means considered the doctrine settled.

In the case of Lawton vs. Steele, 152 U. S. 135, which was a case relating to the waters of Lake Ontario, decided in 1893, the Court said, "All the waters referred to in the Act are unquestionably within the jurisdiction of the State of New York, there can be no valid objection to a law regulating fisheries, etc." The ground stated was that such legislation was within the police power of the State.

And in the case to which we have before referred (20 Howard, p. 93), the Court decided that Old River flowing into the Mississippi River was a stream within the State subject to the control of the State.

Assignment of Errors No. 7 and No. 11:

The Police Jury of the Parish of Plaquemine having authorized and directed the closing of Red Pass, and

Mr. Leovy acting in the premises under that authority, as one of the officers of the parish, the act was not his act, but the act of the political corporation whose agent he was.

Section 10 of the Act of September 19, 1890, 26 Statutes, 454, declares that:

"Every person and every *corporation*, which shall be guilty of creating and continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the Court."

It will be observed, that this Act provides for the punishment of corporations, as well as individuals, who shall be guilty of violating its provisions; that because, apparently, of the impossibility of imprisoning it, a corporation, if it shall commit the offense, shall be subject only to punishment by fine, while an individual may be subjected to fine or imprisonment, or both. The intention of Congress is manifest from the language used, to impose a penalty upon the corporation, when the prohibited act is one for which it is responsible, and not to impose it on any officer of the corporation. If this be the correct construction of the act, it necessarily follows, that the plaintiff in error was not liable to any penalty for his action in the premises.

This discrimination in the matter of punishment in favor of corporations, subjecting them only to a fine, while individuals are subject not only to a fine, but to imprisonment also, is probably without a parallel in legislation, and violates that spirit of equality before the law, which our form

of government and the Constitution guarantees to all men.

"It is our boast that we live under a government of law and not of men; but this can hardly be deemed a blessing, unless these laws have for their immovable basis the great principles of constitutional equality." Lewis vs. Webb, 3 Greenl. 326.

Those who make the laws "are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at the plow." Lock on Civil Government, Sec. 142.

Cooley says:

"This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments." Constitutional Limitations, 392.

By the Act of July 13, 1892 (27 Statutes, 110), Section 7 of the River and Harbor Act of September 19, 1890, was amended and re-enacted, and it was under this section that the plaintiff in error was prosecuted. This was a repeal of that section of the Act of September 19, 1890.

The language of the repealing Act is as follows: "That Section 7 of the River and Harbor Act of September 19, 1890, be amended and re-enacted, so as to read as follows:" Sec. 7, etc.

The language manifests the intention of Congress to substitute a new provision of law in place of the one dealt with, and the new provision covered everything that was embraced in the section for which it was substituted. The effect of this action of Congress was to repeal Section 7 of the Act of September 19, 1890. 23 Am. & Eng. Ency. of Law, 488; *Ibid.* 512.

It will be noted that the penalty imposed by Section 10 of the Act of 1890 is for violations of *that particular Act*. It is the person, or corporation, "which shall be guilty of creating and continuing any such unlawful obstruction *in this Act* mentioned, or who shall violate the provisions of the last four preceding sections *of this Act*," who is to be deemed guilty of a misdemeanor and punished. For the violation of the *provisions of the Act of 1892 no penalty is imposed*, hence, the acts prohibited are without penal sanction, and the indictment and conviction of the plaintiff in error was without authority of law.

In conclusion, we beg again to remind the Court that the issues in this case are not confined to the question of closing Red Pass only. Numerous passes of like character extend through all the swamp lands granted by Congress in 1849 and 1850 to Louisiana and other States, to be drained and reclaimed; and, if the power be denied to close them, or even if this power be made subject to the arbitrary control of the Secretary of War, the reclaiming of millions of acres of land will be rendered impracticable, if not wholly impossible.

The theory contended for by the prosecution would, if maintained, revolutionize the entire relation of the Federal Government to the State levee, quarantine, inspection, and other authorities, and fill the Federal Courts with the clamors of all those discontented with the administration of police laws. It would seriously embarrass officials charged with the execution of vitally important measures in times of great public danger through flood and pestilence. Indeed, it is hardly an exaggeration to say that the police power is the State, embracing, as it does under

the authorities, the prevention of flood and fire, disease and crime, and all other physical and moral evils. No Federal Statute expressly excepts State officers charged with such duties from criminal punishment for official acts; but, under the authorities, not even the Constitutional Amendments, much less Federal Statutes, were meant to subject to indictment for their official and vitally necessary actions the State's quarantine, fire, inspection, police or levee officials, any more than its officers of justice or the Judges of its Courts.

Respectfully submitted,

LEOVY & LEOVY,

ROUSE & GRANT,

Attorneys for Plaintiff in Error.

Office Supreme Court U. S.
FILED
APR 9 1900
JAMES H. McKENNEY
Clerk

No. 238.

Br. of Leovy, Morse & Leovy for Petitioner.

Filed April 9, 1900.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 238.

ROBERT S. LEOVY

versus

THE UNITED STATES OF AMERICA.

BRIEF FOR ROBERT S. LEOVY.

HENRY J. LEOVY,
ALEXANDER PORTER MORSE,
VICTOR LEOVY,
Attorneys for Plaintiff.

Thomason, Print., 526 Natchez Street, N. O.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 238.

ROBERT S. LEOVY

versus

THE UNITED STATES OF AMERICA.

BRIEF FOR ROBERT S. LEOVY.

The annexed brief, which was filed on application for writ of *certiorari* herein, having been previously used in the United States Circuit Court of Appeals for the Fifth Circuit, covers (with the slight additions hereinafter mentioned) the points now before this Honorable Court. The short "Addendum" to be found at the close of the brief contains some important suggestions drawn from Federal legislation since the trial.

We have also added a copy of a map made by the U. S. Coast Survey which we believe will aid in explaining the facts. We have traced upon it in ink the lower part of the bayou (Tonfine), possible commerce with the banks of which defendant is said to have obstructed. We have added this portion, as the bayou appears on the map itself as lost in the marshes. A copy of the map (without our additions) is in the transcript. Red Pass, which does appear on the map, had been closed by nature near the gulf, and had not been used for some years. This is shown by the uncontradicted testimony in the transcript.

UNITED STATES CIRCUIT COURT OF APPEALS

FIFTH CIRCUIT

No. 745.

ROBERT S. LEOVY, PLAINTIFF IN ERROR,

versus

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

STATEMENT.

In about the year 1836 the Mississippi River broke through its banks a few miles above Southwest Pass, at a point known as Gilbert's Canal. Thereafter, up to this time, its waters have, through this crevasse, overflowed the back country, and has made for itself through the marshes several small passes, known as Grand, Tiger, Williams, Spanish, and Red Passes; all, except Grand Pass, being tortuous and insignificant streams, extending from the river through a wide waste of sea marsh to the Gulf; some ten miles distant. At these outlets, even when the streams reach the Gulf, mud flats stretch for several miles, covered by about two feet of water at mean tide. These facts are shown by the United States charts on file.

The result of the annual overflow of the river has been the building up, by deposit of silt, of swamp lands where before was only a sea marsh. A description of these lands

and of the process by which they were made will be found in the testimony of Mr. E. L. Corthell, an expert of national reputation; and Eads' principal assistant in the construction of the Jetties, incorporated in the report of case of State vs. Buck et als., in 46 La. An. p. 673; a suit among claimants of this land which engendered bitter feelings, believed to be the foundation of the present suit. (Rec. p. 23).

In 1849 (9 Stat. at Large, p. 353), Congress granted to the State of Louisiana all the swamp land within the State, in an Act entitled "An Act to aid the State of Louisiana in draining the swamp land therein." The first paragraph of this Act reads: "To aid the State of Louisiana in constructing the necessary drains to redeem the swamp and overflowed land therein," the said swamp lands are hereby donated, etc. In 1850 similar grants were made to other States. And the United States Supreme Court has said that the grant of the lands was "to enable them to *construct the necessary levees and drains* to redeem them." (142 U. S. p. 185).

The State sold to many persons large tracts of this land, some of whom improved them at heavy expense, and others bought, with a view to extensive improvements.

The first step toward the drainage and redemption of these lands was the closing of Spanish Pass in the year 1888. This was done on the petition of property holders; no objection was made and a large tract of land was redeemed and improved. (Rec. pp. 47, 88, 99).

Red Pass remained open, and during high stages of water in the river, it was filled and its banks overflowed for several miles, not only preventing the drainage of that part of the land, but flooding the country for miles above it, *extending*

behind the levees built at great expense *and rendering them useless.* (Rec. pp. 79, 80, 82, 83, 101).

In 1890 some two hundred residents of the vicinity applied to the Police Jury to close this stream. The following is a copy of the resolution of the Police Jury passed in accordance with this petition:

"On motion of Mr. Schoenberger, duly seconded, that the syndic of the 5th ward be authorized to have Red Pass closed, provided property owners are favorable to the closing of said Pass and pay all costs on said work." (Rec. p. 118).

In 1895 Robert S. Leovy was syndic, the officer on whom was imposed the duty of carrying out this work when the property owners were prepared to pay for it. (Rec. p. 119). Finding the property owners both willing to pay the cost and anxious to have the work done, acting officially and under the authority vested in him by the Police Jury, the Pass was closed, as Spanish Pass adjoining it had been under precisely similar circumstances.

Red Pass was a shallow, narrow stream passing through the marsh for some ten miles, and finally emptying in the mud flats on the border of the Gulf, where the average depth was only two feet. One branch had been closed many years, and the few luggers that took oysters to the Gulf for planting or "bedding" always used a branch called Tonfine Pass, so small that on the government charts filed it appears *as lost in the marshes.* No commerce is shown anywhere to have passed over it; nor has it ever conveyed a passenger. Its sole use, and that extremely limited, was for the conveyance of small loads of oysters taken from one bed on one side of the river to be planted

on the other side. Two other streams may be used and were used for the identical purpose, Tiger Pass and Grand Pass, as shown by maps and the testimony. By their use the identical spots may be reached by a slightly lengthened journey. Tiger Pass being one mile distant and deeper and wider. No commerce is destroyed; and this transplanting of oysters may be carried on between precisely the same beds as before the erection of the levee complained of. See testimony of four witnesses, Rec. pp. 63, 71, 79, 94. In other words, these transactions are subjected, for the preservation of the health of the parish and the reclamation of its lands, and their protection from floods, to infinitely less inconvenience than real and important interstate commerce frequently undergoes through other branches of the State's police power, quarantine, inspection, etc.

As to commerce with the banks of the Red Pass, beyond the levee complained of, there is no suggestion that a boat had ever landed there.

These Passes, it must be borne in mind, were in no case natural rivers, but are the outflow of water from the river, through a crevasse left open for years because the condition of the lands, until filled by deposits, did not justify the expense.

In November, 1897, the Police Jury approved the action of their syndic and ratified his action. The following is the resolution (Rec. p. 119):

"Whereas, the Police Jury of the Parish of Plaquemines adopted a resolution on July 1st, 1890, authorizing and directing the closing of Red Pass, a part of the jump, an old crevasse of the Mississippi River, and pursuant thereto Robert S. Leovy, the syndic of the fifth ward of said parish,

did close the same, and the closing thereof has reclaimed large tracts of worthless sea marsh and made it valuable and taxable land, and, by drainage, has improved the health of the district and improved all the land near the Mississippi front; and

"Whereas, since the closing of said Red Pass great improvements have been made on the land adjoining the Pass and many orchards have been built up which will be damaged by the opening of Red Pass; and

"Whereas, the Levee Board of this district has made the new bank a part of the Levee District by resolution passed November 20th, 1897, and protested against the opening of Red Pass;

"*Be it Resolved*, That this Board hereby ratifies and approves the act of said Robert S. Leovy, Syndic, in closing said Red Pass, and unites with the Buras Levee Board in protesting against the opening thereof, and requests the Attorney of the Board to take such steps as in his judgment may be necessary to prevent said Pass from being opened."

The Levee Board adopted the levee thus made as *part of the Levee System* and joined it to the levee made by the State. (Rec. p. 82). They also passed a resolution substantially to the same effect as that just recited. (Rec. p. 8).

For this official action, taken upon a numerously signed petition, authorized and ratified by the only boards having the authority to protect their people from disastrous floods and carry out the purpose of the congressional grant, there being no shadow of any claim of malice or ill will in the official act, and there having been a unanimous decision of the State Supreme Court in favor of the power, and not the slightest protest at the time, Mr. R. S. Leovy, the syndic of his ward, was indicted nearly three years afterward; long after the old pass had presumably grown up in willows

and after part of the reclaimed swamps had become valuable young orchards and truck farms.

The area of land affected by the issues in this case extends to three whole townships, or about 100,000 acres of land. While this suit apparently covers only the question of the guilt of the defendant, it involves, therefore, questions of great importance. The main question is, whether the immense areas involved shall be kept worthless swamps in order that a few oystermen may be saved a slight deviation in their voyages from oyster bed to oyster bed; or whether the lands were rightfully made valuable, the expressed purpose of Congress rightfully carried out, the citizens of the Parish rightfully protected in their health and property from disastrous floods, by the exercise of the State's police power; a power never expressly mentioned in any Federal statute, but impliedly included in all.

ASSIGNMENT OF ERRORS.

Filed June 16, 1898.

United States Circuit Court, Eastern District of Louisiana.

The United States
vs. } No. 2245, C. D.
Augustus F. Leovy and Robert S. Leovy.

And now comes Robert S. Leovy, one of the defendants in this case, and makes and files with his petition for writ of error herein, the following assignments of error:

1st. Said Court erred in sustaining the objection made by the United States Attorney to the introduction in evidence upon the trial of this cause, the resolution adopted by the Board of Commissioners of the Buras Levee District, and in refusing to permit the same to be read in evidence, a copy of which is annexed to and made a part of this bill of exception No. 1.

2d. Said Court erred in refusing to instruct the jury,

as requested by this defendant, as follows, to-wit:—"That upon consideration of the whole evidence adduced upon the trial of the case, the Court direct the jury to acquit the defendants."

3d. Said Court erred in refusing to instruct the jury, as requested by said defendant, as follows, to-wit:—"If the jury shall find that Red Pass is not a natural stream, but simply the result of a crevasse, or outbreak of the Mississippi River from its natural channel, they must acquit the defendants."

4th. Said Court erred in refusing to instruct the jury, as requested by the defendants, as follows, to-wit:—"If the jury shall find that Red Pass was a crevasse, or outbreak, of the Mississippi River from its natural channel, the result of which was to overflow a large portion of Plaquemine Parish to the detriment of the inhabitants thereof, by the destruction of their property, and prejudicial to their health, the State, in the exercise of its police power, delegated to the Police Jury of the Parish of Plaquemine, had a right to close it."

5th. Said Court erred in refusing to instruct the jury, as requested by the defendant, as follows, to-wit:—"If the jury shall find that Red Pass is a crevasse, or outbreak, of the Mississippi River from its natural channel, and overflowed the lands situated on the banks of Red Pass, and that its closing was necessary to reclaim, drain, or levee said lands, or any of them, then it was the duty of the State, under the Acts of Congress of 1849 and 1850, to close Red Pass."

6th. Said Court erred in refusing to instruct the jury, as requested by the defendants, as follows, to-wit:—"Unless the jury shall be satisfied, from the evidence, that Red Pass was, at the time when it was closed, as alleged in the indictment, substantially useful to some purpose of interstate commerce, the jury are instructed that any Federal legislation, purporting to prohibit, or prevent, or interfere with the closing of said stream, would be beyond the powers granted to the Congress by Art. I, Sec. 9, of the Constitution, or otherwise vested by the Constitution of the United

States in Congress, and would be contrary to Amendment 10 of the Constitution of the United States. And the jury are instructed that the defendants claiming and being entitled to the protection of that Constitution must be acquitted."

7th. Said Court erred in refusing to instruct the jury, as requested by the defendants, as follows, to-wit:—"If the jury shall find that the dam constructed at the mouth of Red Pass, was constructed by authority of the Police Jury of the Parish of Plaquemine, and that the defendant, Robert S. Leovy, was an officer of said Parish, and, in constructing said dam, was acting as such under authority of the Police Jury thereof, they must acquit him."

8th. Said Court erred in giving the following instruction to the jury:—"I wish also to say, that the question whether, some 60 years ago, the Jump resulted from the enlargement of some canal which was then in existence, and has been contended here was a crevasse in that sense of the word, you are not to consider at all. As you have been appealed to in the argument to consider that this question involved the right of the State to close a gap in its levees, I say that you have nothing of that sort to consider. I repeat to you, that whether or not 60 years ago the Jump was formed in the manner in which it was contended it was is not a matter for your consideration."

9th. Said Court erred in instructing the jury as follows, to-wit:—"I charge, you gentlemen, that the Police Jury of the Parish had no right to authorize Mr. Robert S. Leovy to dam Red Pass, if Red Pass was a navigable water of the United States. I say that it had no authority, because in the year 1890, the Congress of the United States passed the law under which this indictment has been brought, forbidding the damming of any navigable stream of the United States, without the previous authorization of the Secretary of War. Therefore, as it was not contended in this case that there was any authority from the Secretary, but on the contrary, there is proof tending to show there was no such authority, then it results, that it is no defense for Mr. Robert S. Leovy to show his pretended or alleged

authority from the Police Jury of the Parish of Plaquemine. The Police Jury of the Parish of Plaquemine could not lawfully have dammed it, therefore Mr. Leovy could not."

10. Said Court erred in instructing the jury as follows, to-wit:—"What is a navigable water of the United States? It is a navigable water, which, either of itself, or in connection with other water, permits a continuous journey to another State. If a stream is navigable, and from that stream you can make a journey by water, by boat, by one of the principal methods used in ordinary commerce, to another State from the State in which you start on your journey, that is a navigable water of the United States. It is so called, in contradistinction to waters which arise and come to an end within the boundaries of the State. * * * But if from the water in one State you can travel by water continuously to another State, and the water is a navigable water, then it is a navigable stream of the United States. * * * If it was navigable and connected with waters that permitted a journey to another State, then it is a navigable water of the United States. In this case, if it was navigable, it would be a navigable water of the United States, or might be so in two ways; by connecting with the water of the Mississippi. I mean to say, that if there is evidence here, that you could leave the Mississippi and go into the Jump, and then go to the place where this dam was built by Robert S. Leovy, and some distance beyond that and that it was navigable for boats or vessels carrying on commerce, then it would be a navigable water of the United States, because it would connect with the Mississippi, you could go to the other States of the Union. I say again, that it might connect in another way. It might connect through the Gulf. But the fact that I wish to impress upon you is this, that it is not absolutely necessary that you should find that there was navigability all the way from the Jump out to the Gulf, because if from some point beyond the place, where Mr. Robert S. Leovy built this dam, towards the Mississippi River, the stream was navigable, then it would be a navigable stream of the United

States, because it would connect with the Mississippi River."

11th. Said court erred in rendering sentence and judgment herein against this defendant on the verdict of the jury herein, as the same is of record, because there was no penalty imposed by law for the offense charged in said indictment, of which this defendant was convicted.

Wherefore, by reason of the premises, and for the errors assigned, and others manifest upon the face of the record, said Robert S. Leovy prays that said judgment and sentence may be reversed and set aside, and that he be discharged from the premises, and go hence without day.

(Signed) H. J. LEOVY,
ROUSE & GRANT,
Attorneys for R. S. Leovy, Defendant.

EVIDENCE.

1. The map of the State, filed with the transcript, issued by the Commissioner of the State Land Office, shows the character and extent of the land drained by Red Pass. It also shows the other small, shallow streams running through the marshes. (R. p. 120).

2. The U. S. Coast Surveys. Two maps (pp. 117 and 118). These charts show Red Pass and its relation to Tiger and other shallow marsh streams. One of these maps shows the depth of water on the *mud flat* at the mouth of Red Pass, extending for about three miles from its end. That depth, as shown on the chart, is about two feet. The parol testimony must be taken with reference to these official charts. (R. p. 20). Especially is this true of the absurd statements of some of the witnesses as to the greater distance by way of Tiger Pass. The official charts show how great these overestimates were, and discredit all the testimony of plaintiff witnesses in question. The distance

between the two Passes is about one mile at their mouths. (R. pp. 63, 71, 89, 94).

3. The survey of the lands, made by Connelly in 1836, showing that at that time the bank of the river where the Jump afterwards broke through was intact; and that, consequently, the Jump, at the time of the donation of the lands by the U. S. Government, for leveeing and drainage, was a recent crevasse. (R. p. 120). (These maps are filed with the papers).

4. Field notes of the said Connelly, showing that what is now the Jump was at that time a mere artificial opening for skiffs, a few feet wide. (R. p. 131).

5. Appointment of R. S. Leovy Syndic of the ward. (R. pp. 119, 81).

6. Resolution of the Police Jury of the Parish authorizing the syndic to close Red Pass. (R. p. 118).

7. Resolution of the Police Jury ratifying the act of R. S. Leovy, Syndic of the District, in closing Red Pass. (R. p. 119).

8. Resolutions of the Levee Board ratifying and affirming the resolutions of the Police Jury, and the act of R. S. Leovy. (R. p. 13). Exception to this document was sustained by the Court and bill reserved. (R. p. 8).

9. The levee placed across Red Pass is made part of the general levee system of Louisiana by the Levee Board. Testimony of Shoenberger, President. (R. p. 82).

10. Land Department map of Louisiana.

PAROL TESTIMONY.

1. As to the property affected by the floods from Red Pass.

The map of Louisiana, issued by the Commissioner of the Land Department, shows the character of the lands affected by the floods from Red Pass. It was swamp land and impassable sea marsh from the river to the Gulf. The testimony of Shoenberger, President of the Police Jury and of the Levee Board (R. p. 77), of Mr. Lewis, of the State Board of Engineers (R. p. 44), of Mr. Theodore Wilkinson, Ex.-President of Levee Board (R. p. 98), and of DeArmas, Inspector of the Levees (R. p. 56), shows the emergency in the district. The testimony shows conclusively that if Red Pass be now opened it will, by inundation and by closing the drainage, ruin the most valuable lands and farms in the State. *It will also prevent all future improvement of this whole district.* This testimony is of the very highest character and is uncontradicted by a single witness. We invite attention to the whole testimony of Mr. Shoenberger (R. pp. 79, 83), Lewis (R. p. 48), Wilkinson (R. p. 101). We quote the following from the testimony of Mr. Shoenberger, President of the Levee Board (R. p. 83):

"Well, we have got it drained for 15 miles on the river, giving us splendid drainage. The property in the 5th ward, before those two passes were shut was valued at about $5000; to-day it is valued at $100,000, and if the passes are not opened for five years more it will be three times as much. *If the pass is opened again, it will be all ruined.*

"Q. Are the people of the Parish making any opposition to the closing of this Pass? A. No, sir, only the fishermen. Q. Have there been any improvements made at the jump in building up orange orchards? A. Yes, sir. Q. Have you planted your orchard any further back from the Mississippi since this pass was closed up? A. Yes, sir, I think you can plant it to twice the depth. Q. You have stated these lands are very valuable, these orange orchards; state to the jury why these lands are so very valuable? A.

Well, if a man attends to an orchard, it brings him an income; I have two arpents front a mile below and I was offered $6000 for them; but this year it will bring me $3000 *earnings;* it is two arpents front and three deep. Q. That is, six arpents? A. Yes, sir. Q. You netted $6000 on them? A. I could sell the land to Mr. Socola, but it will bring me in an income of $3000 to $6000 regularly." (R. p. 83).

Mr. Lewis said on this subject:

"Q. From Buras down to the Jump, what is the character of the country along the Mississippi River? A. Well, I judge for about six acres inward, on an average, it is a fine country for orchards, *the finest in the State.* Q. That goes down to the Jump? A. Right down to the Jump." (R. p. 48).

He also added:

"From Fort Jackson down it would be to the interest of the people who have property in that neighborhood, to have the Red Pass and all the outlets down there closed; that is what *they need for proper drainage.*"

And on page 49:

"They are valuable, principally for orange and fruit culture, especially orange culture. There are some orange orchards, I do not know how many of them, but there are many valuable orange orchards below Fort Jackson since the building of the levee, in 1888, and previous to that there was nothing but a palmetto swamp and grazing lands. * * From Buras to Fort Jackson it is five miles, and then there are three miles of very fine orchards below; there would have been a great deal more if there was better drainage."

And he states (on p. 48) that the closing of Red Pass not only prevents overflow, but drains the country all around.

2. As to the character of the Pass.

The Jump Pass and its subdivisions (including Red

Pass) are simply a crevasse, similar in all respects to numerous crevasses closed by this and other States for protection against floods. It was not closed earlier because, prior to about 1880, the river was not leveed, and it would have been idle to place levees across these crevasses. The breaking through the river bank at Gilbert's Canal was a recent crevasse at the time of the donation of the lands by Congress, for the express purpose of leveeing and draining the swamp lands, and for that purpose there was no limit of time in the grant. The country above Red Pass is now leveed by the State, and the levee now in controversy is now part of the system.

We ask attention to the testimony of Sidney Lewis, State Engineer (p. 46), and of Mr. Shoenberger, President of the Parish Levee Board (p. 78), and of Mr. Theodore Wilkinson, ex-President (p. 100), as to this matter of State action in closing crevasses.

Mr. Lewis repeats several times that the Jump was not a natural stream, but simply a crevasse like those which the Levee Board often closed. Mr. Schoenberger says the same thing and enumerates several similar crevasses his Board had closed. Mr. Wilkinson said (p. 100) that the Jump was not in the nature of an ordinary stream, but "only a crevasse, a break in the banks of the river, in which the water broke through and carried deposits of land which filled up here and there and *left a number of shifting channels to the sea;* by the water flowing through deposits, and that it was thus the building up of the land that made the passes. Spanish Pass was stopped up by the State Engineers and nobody ever made an objection to it; on the contrary, the whole community hailed it with delight."

Asked what would be the effect on the prosperity of the State if it were without power to close crevasses, he said (p. 101) that "it would be uninhabitable." Asked if a levee were constructed on the river bank and a pass like Red Pass left open, permitting the water to get behind the levees, what the effect would be, he said, "I would answer that by saying it would be useless. It would be impaired, if not wholly destroyed." (R. p. 101).

3. Not only was Red Pass a mere crevasse and not a natural stream, in the sense of the statute and as construed by the States from time immemorial, but neither by size nor importance was it entitled to the designation of a navigable stream. The question as to what is a navigable stream is one of law and fact. We now ask attention to the question of fact.

In reviewing the evidence on this point, we beg to suggest that much labor will be saved by consulting the coast surveys and the land office map of Louisiana rather than the parol testimony, with respect to the location of the Passes and the character of the country surrounding them. It will then be seen that the opening from the river is quite a broad stream which is called the "Jump;" and that about a half mile from the Jump is a branch of it called Red Pass; and at about a mile from the head of Red Pass is Tonfine Pass (not even named on the U. S. Coast Surveys, and by them ending in the sea marsh some distance from the Gulf).

Three things the evidence shows, which accord moreover with the evidence of Corthell, the expert, to be found in 46th An. 673 (offered in evidence by the Government): First, that for many years all these Passes have been stead-

ily growing shallower and narrower, so that at the time of the closing Red Pass few of the smallest crafts attempted to pass through it. (R. pp. 53, 70, 94). Second. That Red Pass itself had closed entirely some distance from the Gulf, and all the small oyster boats that passed through were compelled to use Tonfine Pass. Third. That, though in some places there is deep water, both Red Pass and Tonfine Pass became narrower and shallower and emptied into mud flats at some distance from the Gulf. At their mouths and for three miles out, according to no standard fixed by the courts, is the water navigable.

It would occupy too much space in this brief to sift the testimony of the witnesses. We think that, on the whole, the Court will see that according to the legal definitions, to which we shall refer, Red Pass was not a navigable stream. Such streams abound in the whole of Southern Louisiana and meander in every direction through vast tracts of the swamp land donated by the Government for drainage and reclamation.

One point is made entirely clear by the evidence, and that is, that absolutely no commerce was ever carried on with the banks of Red Pass, which were, *at the time*, an uninhabited swamp; and it is further clear that no commerce, in any legal or reasonable sense, was ever carried on through the Pass to points beyond it; while it is shown by all the testimony that much of the land can be, and has been made valuable, by drainage, for habitation, and the growth of fruits and other agricultural products; the country thus becoming much more useful in the production of commerce than if occasionally used by small boats for the carrying of oysters for planting purposes; especially when

it is remembered that the result of the damming is not a destruction of the means of transit, but a slight inconvenience. *It is not shown that a single passenger ever was carried through Red Pass; nor a single load of freight destined to any other State than Louisiana, nor indeed a single load destined for any market in Louisiana.* The luggers when loaded with oysters for sale always took other channels. They could not come through Red or Tonfine Pass. (Blaise, pp. 71, 72, 73, 76; Buras, pp. 89, 90, 93; Gibbs, p. 95). The sole use was for carrying in small luggers of oysters from one oyster bed to another (R. pp. 73, 89, 91); a business that can hardly be considered commerce; and it is difficult to understand how, originating and ending in the same State and relating solely to the transplanting of oysters within the State (an industry entirely, as is well settled, under the absolute control of the State), this oyster planting can be considered interstate commerce.

It will also be borne in mind, that even this oyster planting business can be, and has been carried on equally as well through Tiger Pass. The testimony of many witnesses for the defense shows that Tiger Pass is at its mouth only one mile distant from Red Pass, and is as deep and wide. (Record, pp. 63, 71, 89, 94).

Special attention is asked to the testimony relative to the depth of water at and beyond the mouths of Red Pass and Tonfine Pass. Nearly all the witnesses for the Government were oystermen. Their testimony is contradictory in most respects, but shows that Red Pass proper was closed years ago; that Tonfine Pass (a branch of Red Pass) was used in its stead; that sometimes the water at the bar was very low, and that even skiffs had to wait for the Gulf tide;

and that at most there was only about three feet of water over the mud flats. On the other hand, De Armas, the Levee Inspector, who was born and lived all his life near the Pass, testified that there was only a few inches of water on the bar, increased one or two feet at high tide (R. p. 57 *et seq.*) Oxford, the pilot, testified as to ten or twelve inches; that the greatest depth was eighteen inches (R. p. 67). Blaise, who lived near the Jump twenty-eight years, speaks of only four inches at low tide (R. p. 72). Buras, who lived near the Jump, who is a luggerman, swears that when he was in Tonfine Pass last (*six weeks before the closing*) the depth was hardly four inches (R. p. 87); and that the Pass was only from 25 to 30 feet wide (R. p. 93). Gibbs, an oysterman, says he passed five times with a boat drawing 18 inches, and had great trouble to get over the flats every time (R. pp. 94, 95). Stoulich, trapper and fisherman, lived near the Jump five years. The last time he passed through Tonfine Pass, five years before the closing, the flats were nearly dry; not more than four inches of water outside the bar. The deepest water was a foot and a half (R. p. 103). He says that in some places the width of the Pass was about fifteen or twenty feet, from bank to bank. It may have been wider (R. pp. 107, 108).

Taking all this testimony of disinterested witnesses together with the official maps and the character and limited use of this crevasse branch, we think that there can be no doubt that in no sense was Red (or Tonfine) Pass a navigable stream of the United States.

ARGUMENT.

1st. As to the assignment of error No. 1. Defendant

offered in evidence a resolution of the Levee Board showing that the closing of Red Pass had drained and redeemed land and protesting against the opening of the Pass because of the disastrous results that would ensue. The only objection was its irrelevancy. We contend that as the Pass was closed to prevent overflow of the land, that the evidence is relevant. (See Rec. pp. 8, 13).

2d. Under the second assignment. The whole evidence shows that the defendant was not guilty.

3d. Under the third and eighth assignments:

The Act under which defendant was indicted, referring to "navigable waters of the United States," clearly relates to natural and permanent streams and not to those caused by the breaking of river banks or levees. The action of all the States bordering on navigable streams from time immemorial and the construction placed on their police power in such matters and the necessity of preventing disastrous consequences to life and property, conclusively show that the narrow construction placed by the Circuit Court on the words of the Statute is unwarranted by experience or precedent. The testimony of the three experts in the case, Lewis, the State Engineer, Shoenberger, the President of the Levee Board, and Wilkinson, for many years President of the Levee Board, shows that before and since the passage of the Act of 1890 the State authorities have not hesitated to close crevasses when necessary, without regard to their depth. Mr. Wilkinson said, as we have seen, that if the State had not the power to close crevasses "it would be uninhabitable," "the statement would be preposterous that they had not the power to close it." (R. p. 101). His Honor, the ~~Circuit~~ Judge,

said, in substance, that if a stream caused by a crevasse from an interstate river, extended back two or three miles, and was navigable to that extent, it was a navigable stream of the United States within the meaning of the Statute. This definition would include very many crevasses, because the water from many of them is deep, and, if not closed at once, they remain deep for some time. We discuss the subject further under the head of the police powers of the State.

That Red Pass was created by a crevasse is proved beyond doubt. It was a recent crevasse when the lands were donated by Congress to be leveed; and the double power to close it has remained in abeyance for so many years because no interest required that it should be closed, and the lands were not yet greatly improved in its vicinity prior to the year 1890.

Under the Fourth, Seventh and Ninth Assignments of Error:

The error, of which we here complain, is one of extreme importance. It involves the question of the reserved power of the State to protect itself from damage to property, health and life. It has been the subject of discussion ever since the foundation of the Government. There has never been a question as to the *existence* of the power; but concerning the legality of particular acts done in exercise of that power many decisions have been written.

The charge complained of, we submit, with all due respect to the Circuit Judge, goes farther than any decision of which we have any knowledge. It utterly ignores the existence of any police power whatever, where not found (and it is never so found) expressly excepted in the words

of Federal Statutes. It denies the existence of any power in the State, through any instrumentality, whether it be the Governor, authorized by Legislative Act, or the humbler municipal corporations, to dam outbreaks of a river, though such crevasse may carry destruction to the property, health and lives of the people confiding in the protection of these authorities. And the Court apparently deemed this great power destroyed or non-existent because, like quarantine, license and many other branches of the police power, it was not expressly referred to in the statute.

It is proved by the testimony, that the closing of Red Pass was done to drain and reclaim vast tracts of sea marsh donated to the State for that purpose; to prevent inundations in times of high water; and to prevent disease resulting from the existence of vast malarial marshes in the immediate vicinity of an inhabited district. It was shown that this was done by authority of the Police Jury, invested by law with the power; and that this action was subsequently approved by both the Police Jury and the Levee Board. The Levee Board adopted the levee thus made across Red Pass as a part of the general levee system of the State. (R. p. 82). All this action on the part of the State authorities was not only under the ordinary police power, but in pursuance of the terms of the congressional grant.

The reserved "police power" of the State is well defined in the early case of Tharp vs. Rutland R. R. Co. (27 Vermont 149). "It extends to the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the State." This definition is adopted by the U. S. Supreme Court in R. R. Co. vs.

Husen, 95 U. S., p. 471, and in 16 Wallace, p. 62, and by Judge Cooley, in his work on "Constitutional Limitations." (P. 715). That this police power was originally reserved by the States, and is essential to their protection, has been frequently decided by the highest authority. In the case above referred to (95 U. S., p. 471) the Court said:

"We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may be properly denominated police power."

"While for the purpose of self-protection it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the States *beyond what is absolutely necessary for its self-protection.*"

Surely the right to close crevasses, denied by the Court *a qua*, to prevent the inundation of the country and protect the property, health, and sometimes life of the people, must come within the exception stated.

In both the cases of Henderson vs. N. Y., 92 U. S., p. 259, and Lung vs. Freeman, 92 U. S. p. 275, the decisions were based, not on the non-existence of the police power, but on the fact that the acts in question transcended that power and "went beyond their professed purpose." "The police power of a State cannot obstruct foreign commerce beyond *the necessity for its exercise*" is the language of the opinion in R. R. Co. vs. Husen, 95 U. S. pp. 472, 473. (Italics ours).

Judge Cooley, in his work on Constitutional Limitations, adopts, as we have seen, the definition of the Police Power, as laid down in the Vermont case, and adds:

"In the American constitutional system, the police power has been left with the individual States and cannot be

taken from them, either wholly or in part, and exercised under legislation by Congress." (Page 715).

The case of Lawton vs. Steele, 152 U. S. p. 133 (decided in 1893), decides two issues in this case. It declares that Lake Ontario "is unquestionably within the jurisdiction of the State of New York," and it also declares that the police power is "universally conceded to include everything essential to the public safety, health and morals." (P. 136).

"The State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the Legislature, not only what the public interest requires, but what measures are necessary for the protection of such interests." For support of its opinion the Court refers to Barbier vs. Connelly, 113 U. S. p. 27, which is directly in point, not only because it supports our contention as to the doctrine of police power, but in its *application to the draining of sea marshes.*

The Court said:

"Neither the Fourteenth Amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its 'police power,' to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character having those objects in view, *must* often be had in certain districts, *such as for draining marshes* and irrigating arid plains." (Italics ours).

No case could be more applicable to any issue of law than that of Withers vs. Buckley (20 Howard, p. 87). In that case the Legislature of Mississippi, for reasons stated in the decision, closed "Old River," which had long been used for navigation. Its action was attacked on the ground that it violated an Act of Congress. Among other things

the Court said (p. 92): "The Act of Congress of March 1st, 1817, in prescribing the free navigation of the Mississippi and navigable waters flowing into this river, could not have been designed to inhibit the power, *inseparable from every sovereign or efficient government*, to devise and to execute measures for the improvement of the State, although such measures might induce or render necessary changes in the channels or courses of rivers within the interior of the State, etc."

And again (on p. 93):

"*It cannot be imputed to Congress* that they ever designed to forbid, or to withhold from the State of Mississippi, the power of improving the interior of that State, by means either of roads or canals, or *or by regulating the rivers within its territorial limits, although a plan of improvement to be adopted might embrace or affect the course or the flow of rivers situated within the interior of the Sta'e.* Could such an intention be ascribed to Congress, the right to enforce it may be confidently denied." (Italics ours).

We do not think this Court will find it necessary in this case to decide the much contested question as to what would happen in case of direct and irreconcilable conflict between the national legislation and the police power. There is nothing in the Act of Congress covering this case which could bring about such an unfortunate situation. The contention that the mere fact that its terms are general, and make no express exception of acts done under the police power is conclusive upon the point, would, if correct, have saved the United States Supreme Court the labor of considering many of the most important problems ever solved by that tribunal. Little would have been said in quarantine, inspection, drainage, and a dozen other cases, if the Court had been concluded by the fact that, in Federal laws relating to interstate commerce, the mails, etc.,

there cannot be found exceptions as to the State's police acts. Nor will this Court, we submit, lightly conclude that Congress meant to limit and control, by mere inference from general terms, the exercise of the great and ancient power to construct levees; a power which has been always exercised by this and other States similarly situated; a *power absolutely necessary to its protection;* concerning which Mr. Wilkinson fitly said that its absence "would render the State uninhabitable."

The object of the Act was, in general, not entirely unlike that of Federal statutes relating to commerce by land. It was, to take under the control of the Federal Government the erection of structures in and over navigable streams, and making changes in their channels, for purposes of interstate commerce; and to prohibit individual interference with their usefulness; just as other Federal statutes take charge of interstate commerce by land, and regulate rates and charges, and prohibit conspiracies and combinations interfering therewith; just as still other statutes take charge of the mails and prohibit their obstruction. In none of these statutes is express exception made of the quarantine, inspection, levee or other police acts of the State.

In a few of the decisions the power of Congress has been said to be supreme in cases of unmistakable conflict. In others, as in Withers vs. Buckley, 20 Howard, 93, the U. S. Supreme Court said that the power of Congress to take away the police power of a State "may be confidently denied." But in nearly all the cases the Supreme Court has found a way out of the supposed dilemma by assuming that Congress has not designed to deprive the State of what is es-

sential for its protection. Indeed, in order that a conflict actually exist, the Court must find, first, that the action was one necessary for the well-being of the people; otherwise, it would not fall within the police power; and it must then find that Congress intended to prohibit such action. It is manifest that such cases can rarely exist; nor do we know of a case where it has been held that the conflict did actually exist.

This brief would be extended beyond reasonable limits were we to cite in support of our contentions the numerous decisions easily found in any digest. We cite only a few of the most directly applicable. The Court will bear in mind that in this case we have not only the exercise of police power under ordinary circumstances, but under also an express U. S. Statute authorizing the leveeing and drainage of these swamp lands. (See 142 U. S. 185).

1. The theory that the absence of an express exception of State police power concludes the matter and that police acts must be held to be included within the general terms of the prohibition, cannot, we submit, bear the slightest examination. We feel justified in so referring to this theory for the reason that Mr. Justice Fields, voicing the unanimous expression of the United States Supreme Court (in ~~Mulligan vs. Corbin~~, 7th Wallace, p. 485), used equally emphatic language with relation to it. In that case there was a Federal Statute prohibiting, in general terms, without any exception, all obstructions and retardations of mail carriers. The State officer indicted, exercising his police powers, not only retarded a mail carrier, but put him in prison. Yet the United States Supreme Court unanimously upheld his action, saying, "All laws should receive

a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence." And as against the theory that general terms in such statutes are not susceptible of construction, but are determinative as against the police power, we refer, generally, to all the decisions of the U. S. Supreme Court in cases of quarantine and inspection laws. We know of no case where the mere existence of general prohibitive terms in a Federal statute has been held conclusive, except in the charge to the jury in this case. The true rule of construction is the determination by the circumstances of each case as it arises. See 114 U. S. 622; 140 U. S. 545, 554; 127 U. S. 678, 686; 97 U. S. 505.

2. Aside from the reluctance of the courts in this particular class of cases to infer an intention by Congress to control the exercise of the police power, it is a general canon of construction that well-known subjects of great importance are not included in general terms. We refer to Witham vs. City of New Orleans, 22 Sou. Rep. p. 38, where municipal officers are held not included in a State statute prohibiting the dumping of garbage in rivers; and to 42 Fed. Rep. 448, where it was held (in accordance with the well-known decision of the Commission) that the Interstate Commerce Act did not, under the term "carriers," mean to include express companies.

3. As against the theory that by this Act Congress meant to assume control of the policing of the rivers, by levees, etc., we call attention to the notorious fact that Congress has not assumed exclusively, or even generally, the duty of preventing floods; and that, on this assumption,

the State of Mississippi has lately submitted to a vote a proposed amendment to its Constitution. We call attention, further, to the tremendous labors that would be cast upon the Secretary of War under this construction of approving all levees in advance; and to the *delay thus resulting in closing crevasses;* and, on the other hand, to the dangers under which State officers would labor if they acted without his authorization.

4. We draw attention to the fact, that the levee branch of the police power comes under the language of the decisions in reference to cases where there has been no express legislation on a particular subject. The mere general words in the navigation statute do not fill this deficiency. Such general words exist in the statutes relating to interstate commerce, and to the mails; yet, it is generally conceded, that a special statute on the subject of quarantines is necessary to prevent interruptions by quarantine authorities.

5. The subject of levees is one of such importance that it is difficult fully to state it without danger of seeming to exaggerate. Many pages of State Statute books are occupied by Acts devoted to levees alone. They have *quasi* municipal corporations created, and collecting large revenues for their express benefit. They occupy a separate chapter in every Digest. Millions of dollars are annually spent on them. Yet, we are told, that they are meant to be included in a mere list of general words specific enough to mention "dolphins," but not specific enough to mention levees or any similar word; although, in Section 10 of the very same Statute, which concerns the much less important Federal levees, an amendment incorporating the word was made by a special act.

6. Nor, we submit, does the act in question amount to such a total destruction of commerce as to fall outside of the decisions permitting reasonable regulation and reasonable interference. The deviation of a mile forced upon the few oyster planters passing through this marsh stream is a much slighter interference with commerce than the frequent actions of local Boards of Health, tying up trans-continental commerce for months; stopping mails and disorganizing the postal service; holding a foreign steamer for days at the mouth of the Mississippi; and prohibiting, in many Southern ports, for entire seasons, all intercourse with many important foreign ports. Yet slight as was the enforced deviation in this case, it was not for that that the Police Jury was condemned. The charge of the Court was to the effect that the question of whether the crevasse stream was navigable through its mouth might be disregarded. It was because there was a physical possibility of commerce by water between the untrodden swamps lying below the levee, and States far distant, that the levee was held illegal. We respectfully submit that this construction does not follow the rule above quoted by us, that: "General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence."

We ask the Court to decide that (as was said of the Fourteenth and other Amendments, 133 U. S. 31; 140 U. S. 555) this Act was not designed to interfere with the power of the State to promote the peace, morals, education and good order of the people; and that from the very nature of the case State legislation of a special character having these objects in view must often be had in certain

districts "as for draining marshes;" that (as was said in Bowman vs. Ry. Co., 125 U. S. 465) cases of alleged conflict between the power of the States and the letter of Federal Statutes "must be determined according to the circumstances of each particular case." We need hardly refer to the infinitely more important interference with commerce in the case of [illegible] (See Red. Rep. p. 674) or in many cases of [illegible], etc. We think that, without referring to particular precedents, this Court will have little difficulty in concluding that it was a reasonable exercise of the police power of the State of Louisiana to close this old crevasse, even though its closing might theoretically interfere with a physically possible but practically non-existent and practically impossible commerce by water with the untrodden sea marsh forming its banks. Levees cannot, we submit, be torn down and orchards and gardens reconverted into pestilential swamps; parishes flooded, and their inhabitants reduced to poverty upon this forced construction, new to the experts who have testified and condemned by the United States Supreme Court. We respectfully refer to the old decision, cited in 7 Wallace, p. 785, that in spite of a statute against breaking jail, a prisoner "need not stay to be burned in order that he may be hanged." We submit, that the people of Plaquemines Parish need not stay to be drowned in order that they may more conveniently be reached by oyster boats.

The decisions of the State Supreme Court show that the power to regulate these small streams and bayous which run through every part of the State has been recognized for many years as necessary for redeeming large and valuable tracts of land. The case of Boylan vs. Shaffer (13 An. p.

131) is one of these. The Court said, in that case: "Were the mere fact that steamboat or flatboat had been a short distance up a stream or bayou in high water a sufficient ground for declaring it a navigable stream, every slight depression on the banks of the Mississippi would then become a navigable stream and should be opened for the benefit of rafts and boats and the convenience of a few persons, to the total destruction of the planting interests on the banks of the River. It is well known that the State has, for a number of years, been *closing the small bayous making out of the principal rivers and bayous, and thus redeeming large and valuable tracts of land.*" (Italics ours).

In the case of Egan vs. Hart (Judge Parlange being the organ of the Court, 45 An. p. 1358), it is said that the action of the Legislature would have been futile indeed if it had charged the "State Engineers with the great duty of protecting the alluvial part of the State from overflow but had taken from them the power to build levees across the bayous and sloughs." The Act of 1886 assumed, "as a matter of course, that the Board of State Engineers has this power." And the Court quotes a statute which authorizes the closing of bayous, etc.: "Besides, the bayou is wholly within the State and the State authority over it is complete." (This bayou emptied into Red River).

It will be borne in mind that at the time Red Pass was closed this was the adjudicated law of the State; and, for acting under it, the defendant has been found guilty and fined. In the case now before the Court, the Judge charged the jury that Red Pass, even if not navigable through to the Gulf was, if navigable, a stream of the United States, and not a stream wholly within the State. The case of Egan vs. Hart was reviewed by the United States Supreme Court. (165 U. S. p. 188). But the U. S. Supreme Court

held, that as it had been decided as a matter of fact that the bayou above the bar was not navigable, it need not discuss the questions of law. Both in this case and in that of Lake Shore vs. Michigan R. R., 165 U. S. p. 368, the U. S. Supreme Court expressly refused to decide whether the Act applied to streams passing through only one State, even if forming a chain with interstate streams; and in the latter case it is possible to surmise from the language of that Court that it leaned against such construction.

Assignment of Errors, No. 6:

We asked the Court, in substance, to instruct the jury that if Red Pass, when closed, was not substantially useful to some purpose of interstate commerce, Federal legislation on the subject was "beyond the power of Congress," referring to Article 1, Section 9, and Amendment 10 of the United States Constitution. As the Statute of 1890 was based on the power of Congress to regulate commerce among the States, it would seem clear that the soundness of the proposition was indisputable.

The Statute provides penalties for obstructing navigable waters of the United States. What is a navigable stream is a question of law and fact. As a question of fact we think the evidence is conclusive, that at the time of closing Red Pass, that stream was in no legal sense a navigable stream, useful for purposes of commerce.

The highest courts have defined the meaning of "navigable streams." A concise digest will be found in 16th Am. & Eng. Encyclopedia of Law, at page 241. It is there said that "in order that waters may be navigable in the legal sense, *commerce must be carried on over them which is of an essentially valuable character.*" Many decisions sup-

porting this definition are referred to in the foot note. Now, the evidence shows that no commerce whatever was carried on on Red Pass at the time when it was closed, nor was there any intercourse with other States that could be claimed as commerce in any sense whatever. The definition asked in the charge substantially corresponds to that quoted above, and we submit that it is elementary that if the defendant was protected by the United States Constitution (as he clearly was) from punishment for damming any stream not falling under the constitutional powers of Congress, and there being evidence to show that Red Pass was not such a stream, he was clearly entitled to have his constitutional protection stated to the jury. Without such charge, the jury was clearly not advised as to the fundamental law governing the case.

Assignment of Error No. 10:

We contend that Red Pass was essentially a stream wholly within the State and wholly within the jurisdiction of the State.

The main case relied on to establish the contrary is that of The Daniel Ball, 10 Wallace, p. 557, decided in 1870. But a close examination of the case does not bear out this construction. The case was one applying to a statute relative to licensing vessels, and it was decided that goods shipped in a vessel in Michigan and marked for another State were covered by the terms relating to commerce between the State, and were subject to the control of Congress, that a vessel receiving freight in one State destined for another State was an instrument of commerce, subject to the license laws of the United States. The case of The Montillo, decided at the same time (11 Wallace,

413), was based on the decision in the Daniel Ball case, and on the same point, as to licensing vessels.

The later decisions have been clearer as to the control of the State over streams wholly within the State, although connecting with others extending beyond it. We have seen that in the case of Egan vs. Hart, 44 An. p. 7, it was so decided by the Supreme Court of Louisiana. That case was appealed to the U. S. Supreme Court. The Court stated, but found it unnecessary to decide the point. And in another case in which the same point was raised, found in the same volume, that of Lake Shore R. R. Co. vs. Ohio, 165 U. S. p. 365, the Court again declined to decide the point, and the tenor of its language seems to be rather against the doctrine stated in the charge in this case. These very late cases certainly show that the U. S. Supreme Court by no means considered the doctrine settled.

In the case of Lawton vs. Steele, 152 U. S. 135, which was a case relating to the waters of Lake Ontario, decided in 1893, the Court said, "All the waters referred to in the Act are unquestionably within the jurisdiction of the State of New York, there can be no valid objection to a law regulating fisheries, etc." The ground stated was that such legislation was within the police power of the State.

And in the case to which we have before referred (20 Howard, p. 93), the Court decided that Old River flowing into the Mississippi River was a stream within the State subject to the control of the State.

Assignment of Errors No. 7 and No. 11:

The Police Jury of the Parish of Plaquemine having authorized and directed the closing of Red Pass, and

Mr. Leovy acting in the premises under that authority, as one of the officers of the parish, the act was not his act, but the act of the political corporation whose agent he was.

Section 10 of the Act of September 19, 1890, 26 Statutes, 454, declares that:

"Every person and every *corporation*, which shall be guilty of creating and continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the Court."

It will be observed, that this Act provides for the punishment of corporations, as well as individuals, who shall be guilty of violating its provisions; that because, apparently, of the impossibility of imprisoning it, a corporation, if it shall commit the offense, shall be subject only to punishment by fine, while an individual may be subjected to fine or imprisonment, or both. The intention of Congress is manifest from the language used, to impose a penalty upon the corporation, when the prohibited act is one for which it is responsible, and not to impose it on any officer of the corporation. If this be the correct construction of the act, it necessarily follows, that the plaintiff in error was not liable to any penalty for his action in the premises.

This discrimination in the matter of punishment in favor of corporations, subjecting them only to a fine, while individuals are subject not only to a fine, but to imprisonment also, is probably without a parallel in legislation, and violates that spirit of equality before the law, which our form

of government and the Constitution guarantees to all men.

"It is our boast that we live under a government of law and not of men; but this can hardly be deemed a blessing, unless these laws have for their immovable basis the great principles of constitutional equality." Lewis vs. Webb, 3 Greenl. 326.

Those who make the laws "are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at the plow." Lock on Civil Government, Sec. 142.

Cooley says:

"This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments." Constitutional Limitations, 392.

By the Act of July 13, 1892 (27 Statutes, 110), Section 7 of the River and Harbor Act of September 19, 1890, was amended and re-enacted, and it was under this section that the plaintiff in error was prosecuted. This was a repeal of that section of the Act of September 19, 1890.

The language of the repealing Act is as follows: "That Section 7 of the River and Harbor Act of September 19, 1890, be amended and re-enacted, so as to read as follows:" Sec. 7, etc.

The language manifests the intention of Congress to substitute a new provision of law in place of the one dealt with, and the new provision covered everything that was embraced in the section for which it was substituted. The effect of this action of Congress was to repeal Section 7 of the Act of September 19, 1890. 23 Am. & Eng. Ency. of Law, 488; *Ibid.* 512.

It will be noted that the penalty imposed by Section 10 of the Act of 1890 is for violations of *that particular Act*. It is the person, or corporation, "which shall be guilty of creating and continuing any such unlawful obstruction *in this Act* mentioned, or who shall violate the provisions of the last four preceding sections *of this Act*," who is to be deemed guilty of a misdemeanor and punished. For the violation of the *provisions of the Act of 1892 no penalty is imposed*, hence, the acts prohibited are without penal sanction, and the indictment and conviction of the plaintiff in error was without authority of law.

In conclusion, we beg again to remind the Court that the issues in this case are not confined to the question of closing Red Pass only. Numerous passes of like character extend through all the swamp lands granted by Congress in 1849 and 1850 to Louisiana and other States, to be drained and reclaimed; and, if the power be denied to close them, or even if this power be made subject to the arbitrary control of the Secretary of War, the reclaiming of millions of acres of land will be rendered impracticable, if not wholly impossible.

The theory contended for by the prosecution would, if maintained, revolutionize the entire relation of the Federal Government to the State levee, quarantine, inspection, and other authorities, and fill the Federal Courts with the clamors of all those discontented with the administration of police laws. It would seriously embarrass officials charged with the execution of vitally important measures in times of great public danger through flood and pestilence. Indeed, it is hardly an exaggeration to say that the police power is the State, embracing, as it does under

the authorities, the prevention of flood and fire, disease and crime, and all other physical and moral evils. No Federal Statute expressly excepts State officers charged with such duties from criminal punishment for official acts; but, under the authorities, not even the Constitutional Amendments, much less Federal Statutes, were meant to subject to indictment for their official and vitally necessary actions the State's quarantine, fire, inspection, police or levee officials, any more than its officers of justice or the Judges of its Courts.

Respectfully submitted,

LEOVY & LEOVY,

ROUSE & GRANT,

Attorneys for Plaintiff in Error.

ADDENDUM.

By Act of Congress approved March 3, 1899 (Fifty-fifth Congress, Sess. III, Ch. 425, Sec. 9 *et seq.*, p. 1151), the legislation under which this indictment was brought has been greatly changed. Under the proviso at the end of Section 20, actions begun or rights of action accrued prior to the passage of the Act, are not affected thereby. It may be, therefore, that the change is of importance only on account of the inferences that may be drawn from such action as to the meaning and effect of the prior legislation.

It will be noted that the inclusion of this very proviso in the later legislation gives strong support to the argument to be found in the present brief, on pp. 36 and 37, to the effect that Section 7 of the Act of 1890 having been amended and re-enacted by the Act of 1892 (without any saving clause), had been repealed. If a saving clause was necessary in the Act of 1899, was it not necessary in the Act of 1892?

An inference of much wider scope is also legitimately to be drawn from the nature of the change made by the Act of 1899. Sec. 7 of the Act of 1890 forbade the obstruction of navigation "without the permission of the Secretary of War." So also did Sec. 7 of the Act of 1892. It will be seen from the very language of the Acts referred to, that the Secretary of War was not to decide whether any proposed structure would obstruct navigation, and then issue or refuse his permission according to such decision. The plain meaning of the Act was, that any one armed with the permission of the Secretary of War could, without any penalty whatsoever, obstruct navigation to any extent

allowed by that officer. Nor would the Secretary, in issuing a permit for such obstruction, have violated any duty imposed on him by the Act. On the contrary, the meaning was perfectly plain, that he should issue permits for *some* obstructions; although absolutely no ground was even suggested on which he should permit some obstructions and refuse others. There was not even the regulation usual in certain classes of licenses, that he should determine the fitness of the applicant.

Congress has since, by the legislation to which we have above referred, taken away this power. Under the legislation now in force, the power to obstruct must be derived from Congress itself (or from State Legislatures in certain cases).

Under the legislation under which this indictment was brought, it was possible, without incurring the penalties prescribed, to construct a bridge or other works under an Act of a State Legislature, after the plans had been approved by the Secretary of War. But it was also possible for a mere private individual, without incurring any penalties, to construct a dam or any other obstructions simply with the "permission of the Secretary of War." The first power still exists, in certain cases, and was approved by this Honorable Court in Lake Shore & Michigan Railway vs. Ohio, 165 U. S., at p. 368. But the second power, that of "permitting" the making of obstructions without any legislative authority, State or Federal, that decision passes, without deciding. (P. 368). And Congress has since taken the power away.

It is true that the legislation attacked does not in express terms give the Secretary of War unlimited power to

originate dams, bridges and other obstructions, by issuing licenses to private individuals not armed with any legislative authority, State or Federal. But it does give legal force and effect to such permits, so issued, by providing a punishment for the individual not armed with such a permit and allowing such a permit to constitute a perfect protection to him to whom it is issued. Clearly, if Congress could not vest in the Secretary of War the power to issue such permits, it could not make them the basis of discrimination between citizens performing similar acts, or, indeed, endow them with any force whatsoever. This Honorable Court has used emphatic language on this general subject in Yick Wo vs. Hopkins, 118 U. S., at page 370:

"But the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessing of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth may be '*a government of laws and not of men.*'" (Italics ours).

We have referred to the case of Yick Wo vs. Hopkins, because we conceive that it clearly decides that penalties may not be made to hinge upon the existence of illegal permits. We conceive that it further decides that our government, State or Federal, cannot be a government by mere "permission." The decision rested upon the XIV Amendment. Our present contention may well rest upon Amendment V, upon the Preamble to the Constitution, and upon the division of the government into its respective branches.

It will be remembered that the defendant in this case

was not indicted for constructing a bridge or other works under a legislative act of the State, without having the plans approved by the Secretary of War. That was neither the theory of the prosecution nor the language of the indictment. He was indicted for having made a dam without the "permission" of the Secretary of War. The case against him must, therefore, rest on the portion of the Act which we have attacked. It does not, therefore, rest upon the portion approved in Lake Shore vs. Michigan (*supra*) but upon a part of the law resting upon a question which that opinion expressly passed without deciding. It has been held proper legislation to require the Secretary of War to approve plans for work having legislative authorization. But to authorize him, in the exercise of arbitrary power, to "permit" private citizens to dam rivers is a very different matter. And to make such permits, if issued, the final guide as to punishment or impunity of course requires as much constitutional authority as to directly authorize them.

It is with great diffidence that we question the constitutionality of an Act of Congress. But the Act in question was novel in federal legislation, a century having passed without a similar Act. Its language is confused; it has been twice amended; and this Honorable Court in the case referred to above passed without deciding what we conceive to be practically the very point we now urge. And since that time the objectionable feature has been eliminated by Congress itself. If our contention be correct, it is plain, upon the face of the record, that there was no constitutional law (and, therefore, no law at all) forbidding the act charged in the indictment, and no penalty imposed by law therefor;

and the record when considered under the light of the Constitution could not justify the conviction or punishment of the defendant. So far as the present case is concerned, the effect of such a decision would simply be to prevent the punishment of a defendant performing an official act, justified by an unanimous decision of his State Supreme Court, saving his Parish from disaster, and found by the jury, under the charge, to interfere with a theoretically possible but practically non-existent commerce from other States with the borders of the bayou; an act never questioned until long afterwards. So far as the general effect of such a decision is concerned, it would simply hold that the legislative status from 1890 to 1899 was the same as that for a century previous. But we submit, that to maintain the constitutionality of the clause that has been repealed, would form an exceedingly dangerous and far-reaching precedent. The principles on which we rely underlie all the powers of the government.

Respectfully submitted,

HENRY J. LEOVY,
ALEXANDER PORTER MORSE,
VICTOR LEOVY,
Attorneys for Plaintiff.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

ROBERT S. LEOVY, PETITIONER,
v.
THE UNITED STATES. } No. 238.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Augustus F. Leovy and Robert S. Leovy were indicted on May 19, 1897, under the act of September 19, 1890 (26 Stats., 454), as amended by the act of July 13, 1892 (27 Stats., 110).

The indictment charged them with having, on November 16, 1895, and on other diverse days during that month, built and caused to be built a dam across a certain navigable river of the United States, known as "Red

Pass," in the parish of Plaquemines, in the State of Louisiana, without first having obtained the consent and permission of the Secretary of War of the United States, and with thus having closed said navigation on said stream, in violation of said law. The defendants pleaded not guilty, and on the trial the jury rendered a verdict against Augustus F. Leovy of not guilty, and found Robert S. Leovy guilty as charged in the indictment, and the court sentenced said Robert S. Leovy to pay a fine of $200 and the costs of the prosecution.

The petitioner here, said Robert S. Leovy, on the trial in the circuit court of the United States for the eastern district of Louisiana reserved three bills of exception to the rulings of the trial judge and presented eleven assignments of error upon a writ of error sued out from said circuit court of the United States for the eastern district of Louisiana to the circuit court of appeals of the United States for the fifth circuit; and said cause coming on to be heard in said circuit court of appeals on Tuesday, February 28, 1899, it was ordered and adjudged by said circuit court of appeals that the judgment of the said circuit court for the eastern district of Louisiana be affirmed. Whereupon said petitioner presented to this court his application for a writ of certiorari to the said circuit court of appeals for the fifth circuit, which said application was allowed by this court on the 6th day of May, 1899, and accordingly the case is before the court upon said writ for a review of the decision of the said circuit court of appeals and the judgment of the circuit court for the eastern district of Louisiana.

ARGUMENT.

I.

The first assignment of error complains of the rejection by the trial judge of a certain paper writing offered in evidence by the petitioner (record, pp. 13 and 14), being a resolution of the board of commissioners for the Buras levee district, at a meeting held in Buras, La., on Saturday, November 20, 1897, wherein it was by resolution attempted to ratify and adopt the action of the petitioner in damming said Red Pass and to confirm said action as the action of the board of commissioners of the Buras levee district. The court below refused to admit this paper writing in evidence, upon the ground of immateriality and irrelevancy, and it is submitted that the action of the trial court was clearly correct—first, because the board of commissioners for the Buras levee district had no more authority to close the pass than did the petitioner, and second, because the resolution was not adopted until November 20, 1897, long after the closing of Red Pass and after the indictment was found against the petitioner, said Red Pass having been dammed on November 16, 1895, and the indictment having been presented on May 19, 1897. (See record, p. 31 and p. 2.) Clearly, therefore, this ex post facto resolution could have no effect as an authorization by the board of commissioners for the Buras levee district to the petitioner to erect the dam complained of.

Besides, it is well settled that a party complaining of the rejection of evidence must show that if the evidence had been admitted it would probably have produced a

different result on the trial. (*Packett Company* v. *Clough*, 20 Wall., 528.) In this case, if the resolution of this board of commissioners had been received in evidence, it could not possibly have produced any different result in the verdict of the jury or in the judgment of the court, for the plain reason that the board of commissioners had no more authority to dam this stream without the consent of the Secretary of War than did the petitioner in his personal capacity, as will more fully appear in the consideration of the subsequent assignments of error.

II.

The second assignment of error complains that the court refused to instruct the jury to acquit the defendant upon the whole evidence.

The indictment charges the petitioner with having dammed a navigable stream of the United States without the consent of the Secretary of War, as required by the act of September 19, 1890, as amended by the act of July 13, 1892. The fact that the petitioner did erect the dam across Red Pass, in manner and form as complained of, is admitted. The only question is as to the navigability of this stream. This is a mixed question of law and of fact, and the charge of the trial judge properly left the determination of the element of fact to the jury. The jury were instructed (pp. 112, 114, 115) that—

> The main, if not the only, question for you to decide is, whether Red Pass was a navigable stream of the United States. I will say to you at the outset, that you are the sole judges of the facts and of

the credibility of the witnesses. I am the sole judge of the law; you must take the law as I give it to you. I have a right to review the facts, and even to express an opinion upon them, but I say to you very distinctly that if I do so, any expression of opinion of mine, on any matter of fact, is in no manner binding upon you.

* * * * *

Now then, as I said to you at the outset, the only question for you to decide is—under the admission that Robert S. Leovy dammed the pass, and assuming that you will agree with me that there is not sufficient evidence to convict Mr. Augustus F. Leovy—I say to you that the sole question for you to decide is whether Red Pass, at the time Mr. Robert S. Leovy dammed it, was a navigable water of the United States.

What is a navigable water of the United States? It is a navigable water, which, either of itself, or by connection with other waters, permits a continuous journey to another State. If a stream is navigable, and from that stream you can make a journey by water, by boat, by one of the principal methods used in ordinary commerce, to another State, from the State in which you start upon your journey, then that is a navigable water of the United States. It is so called, in contradistinction to waters which rise and come to an end within the borders of a State. Suppose you had two lakes within the State, with a little river connecting these two lakes, both of the two lakes and the little river being within the confines of one and the same State, these waters would not be navigable waters of the United States, whether they were navigable or not, for the reason that you could not, from any point on these waters, travel continuously by water to another State of the

Union. But if from the water in one State (as I said before, and repeat, because it is important) you can travel by water continuously to another State and the water is a navigable water, then it is a navigable stream of the United States.

Now, then, what is a navigable river? A navigable river is a river which is navigable in fact, a river which affords a channel for useful commerce. One of the witnesses for the defendants stated to you his idea of a navigable stream to be a stream that permitted large steam vessels to navigate. This is not the idea of the law. If the stream will bear any vessel which is used in ordinary commerce then it is a navigable stream. Therefore, the question is, Was Red Pass navigable? Was it a navigable water of the United States? If it was navigable, and connected with waters that permitted a journey to another State, then it is a navigable water of the United States. And in this case, if it was navigable, it would be a navigable water of the United States, or might be so in two ways: By connecting with waters of the Gulf if you should find it connected that way, or by connecting with the water of the Mississippi. I mean to say that if there is evidence here that you could leave the Mississippi River and go into the Jump and then go to the place where this dam was built by Mr. Robert S. Leovy, and some distance beyond that, and that it was navigable for boats or vessels carrying on commerce, then it would be a navigable water of the United States, because it would connect with the Mississippi and from the Mississippi you could go to other States of the Union.

* * * * *

All these things you are to take into consideration. You have the testimony, as I remember, of men

> who say they have gone through there. If Tonfine Pass and Red Pass are available for commerce and navigation by means of luggers and oyster boats for the purpose of useful commerce, it would be a navigable stream; and if you find that it connected with other waters over which a continuous journey could be made to other States, then it would be a navigable water of the United States.

This charge, as will more specifically appear in the consideration of other assignments of error, is a perfectly sound enunciation of the law on the subject with which it deals. Upon the evidence, the jury was left to determine whether the pass was in fact navigable. Under this charge, of course, the petitioner could not have been convicted, unless the jury found that the pass was navigable in fact; and the decision of the jury upon this point can not be overturned by an appellate court, if there was any competent evidence whatever before the jury upon which they might have reached such a conclusion. Where there is some evidence tending to establish a fact in issue, the jury must be the sole judges of its sufficiency. (*Richardson* v. *Boston*, 19 How., 263; *Insurance Company* v. *Snyder*, 93 U. S., 393.)

The appellate court can only look at the evidence to determine its competency. If competent, the fact found by the jury, and all inferences deducible from that fact are binding upon the appellate court. (*Hepburn* v. *DuBois*, 12 Pet., 345–375; *Damberger* v. *Schoolfield*, 160 U. S., 149; *Manufacturing Company* v. *Brill*, 7 U. S. App., 601.)

The testimony of twelve witnesses was presented to the jury on behalf of the prosecution to establish the fact

that said pass was navigable and that from said pass a continuous trip could be made to the Mississippi River and into the Gulf of Mexico; and the testimony of these witnesses further established the fact that said pass was used by a great number of persons for the purpose of conveying oysters and other merchantable produce through it to the markets, and that the same was navigable for oyster boats and luggers engaged in said trade, and that in its ordinary stages said pass contained from $2\frac{1}{2}$ to $4\frac{1}{2}$ feet of water.

William O'Brien (Record, p. 16) testifies that at the point on Red Pass where this dam was erected, said stream was about 150 feet wide and contained $4\frac{1}{2}$ feet of water.

Patrick Galligan (Record, p. 20) testifies to having used this pass in his boat going all the way down from the Jump engaged in selling potatoes, vegetables, and beef.

R. M. White testifies that he has known the pass since 1875; that he has frequently been over it and taken out willows on barges drawing from 4 to 5 feet of water by the tugboat, and that he has frequently seen luggers go through the pass down into the Gulf of Mexico.

John Collen (Record, p. 25) testifies to having used this pass in the navigation of his 35-barrel oyster boat, which drew about $2\frac{1}{2}$ feet of water, and on page 26 he says:

> I go through the Jump where Mr. Leovy closed into the Mississippi River. I get into Cubitt's Gap from there, and go round this side back of the quarantine to get my oysters; and when I came back I came through where Mr. Leovy closed.

On page 27 he testifies that he went all the way to the Gulf by going through this stream. He says that the pass contains from 10 to 12 feet of water on the straight, and in the bends from 5 to 6 feet. When asked what was the depth all the way through to the Gulf, he answers, from 5 to 10 or 15 feet; that is, all the way to the Gulf; but then there is a bar at the outer end of the pass, and of course when you come there you only find 2½ or 3 feet; then if you stay there a couple of hours the tide will rise, and you can find from 3 to 4 feet of water. He testifies that he has known many other people going through that stream with their boats, and names them; that he has seen them there, and knows of his own knowledge that they used this stream with their luggers and boats—luggers holding from 125 to 150 barrels of oysters. On page 28 he testifies that there would be from 25 to 30 boats passing through there every day, having a good channel and a good place to pass through.

Marco Benditich (Record, pp. 29 and 30) testifies that he has been through this pass with a lot of lumber; that he went through Red Pass and Tonfine Pass and got to sea with his load of lumber; that he went through Red Pass and then through Tonfine Pass to the Gulf of Mexico; that he was drawing about 3½ feet of water; that he has also been through the same route with oysters, and that his boat was a 6-ton boat.

Marco N. Benditich (Record, pp. 31 and 32) testifies that he has been through this pass to the Gulf of Mexico; that he went through Red Pass into the Mississippi; then down the river 3 or 4 miles to the new quarantine,

and from thence into the Gulf; that his boat when he went through there was drawing 3½ feet of water.

Luke Scovell (Record, pp. 35 and 36) testifies that he has been through this pass in a lugger of little over 7 tons; that he went through there every year; that he has been going throught here for fifteen years; that he went down into the Jump and into Red Pass.

Michael Fanitivitch (Record, pp. 36 and 37) testifies that he was engaged in the oyster business. He has been through this pass every year in boats carrying 125 barrels of oysters and which drew 4 feet of water; that he has frequently been through the pass as high as five and six times during the winter—sometimes ten times; that he would go down the river sometimes and would pass through Red Pass, and at the branch of Tonfine go out into the sea.

Bozo Bogetto (Record, pp. 37 and 38) testifies that he is engaged in the oyster and lumber business, and has been so engaged from 1881; that he used this pass from 1881 to 1893; that his boats hold from 100 to 110 barrels of oysters, drawing at from 3 to 3½ feet of water. He brought oysters and lumber from the east.

Peter Stevelovich (Record, pp. 39 and 40) testifies that he used this pass in the oyster business; that his boat drew 4 feet of water.

Steffano Rusich (Record, pp. 41 and 42) testifies that he passed through Red Pass and Tonfine Pass with oyster boats and has been doing so for some seventeen years; that his boats carry about 120 barrels of oysters, and drew from 3 to 3½ feet of water.

There was some evidence offered by the petitioner in

rebuttal, but we need not pause to consider it. The jury was the sole judge of the sufficiency of the evidence to establish the fact of the navigability of this stream, and having so found upon the competent evidence, it follows, the damming of the stream being admitted, that the petitioner is proven to have done the act complained of in the indictment. That the petitioner, therefore, is guilty of the act complained of in the indictment is a fact established by competent evidence and found by the jury and is not now subject to animadversion.

Whether the act complained of in the indictment was an unlawful act will appear from the consideration of subsequent assignments of error.

III.

The third and eighth assignments of error are best considered together. They complain of the refusal of the court to give the instruction requested by the petitioner, as set out in said third assignment of error (record, p. 126), and of that portion of the general charge set out in the eighth assignment of error (record, pp. 127, 128). The effort here made is to draw a distinction between what counsel terms a "natural stream" and a stream made by a crevasse; and the argument is made that "the act under which the defendant was indicted, in referring to 'navigable waters of the United States,' clearly relates to natural and permanent streams and not to those caused by the breaking of river banks and levees." Does counsel mean to assert that this pass is not a "natural" stream? According to their own evidence, it is a stream which

came into existence about the year 1836 by the Mississippi River seeking an outlet near its mouth by natural forces, resulting in the creation of the stream in question by operation of nature, without any artificial assistance. It is certainly not an unnatural nor an artificial stream, and it must, therefore, be a natural one.

Again, does counsel mean to assert that this is not a "permanent" stream? According to their own evidence it was created some time about 1836 and has been in existence ever since. It strikes us that a stream which has existed for nearly three-quarters of a century is about as permanent as a thing can well be. The origin of Red Pass is entirely irrelevant to the issue. It is immaterial whether nearly three-fourths of a century ago the pass was formed by the Mississippi River breaking its banks and the formation of a new channel for its outlet to the Gulf. If it is in fact navigable—navigable by Durham boats, oyster boats, flatboats, or any usual or ordinary method of travel or vehicle of commerce, then it is a navigable river; and if by itself, or through its connection with other rivers, lakes, or bodies of water whatsoever, a continuous passage may be made through it, in its ordinary stages, to another State, or to a foreign country, then it is a navigable water of the United States, and over which the Federal Government is given paramount and exclusive jurisdiction and control by the Constitution, even though such river be situated wholly within the confines of a single State. The only questions to be decided, therefore, are, first, is Red Pass navigable in fact, under ordinary conditions and by ordinary means; and, second, can a passage be

made through it and its connections to another State or to a foreign country? Both these questions of fact were properly left by the court to the determination of the jury, as witness the charge of the trial judge, heretofore quoted under division I of this brief, and which is to be found on page 116 of the record. The law, which results from an ascertainment of the fact that Red Pass and its connections were navigable in fact, and that through them a continuous journey could be made in their ordinary stages to another State and to a foreign country, was clearly and correctly stated in the charge of the trial judge, as cited ante.

The different meanings of the word "navigable" as employed in legal phraseology are thus defined by Gray, C. J., in *Commonwealth* v. *Vincent* (108 Mass., 441–447):

> The term "navigable waters," as commonly used in the law, has three distinct meanings: First, as synonymous with "tide waters," being waters whether salt or fresh, wherever the ebb and flow of the tide from the sea is felt; or second, as limited to tide waters which are capable of being navigated for some useful purpose; or third, as including all waters, whether within or beyond the ebb and flow of the tide, which can be used for navigation.

In this country the word "navigable" is not employed in the technical or English sense of that expression, and a water is "navigable" if it be navigable in fact, without any reference to the action or influence of the tide. In the case of *Daniel Ball* (10 Wall., 557–563) Mr. Justice Field, for the court, said:

> The doctrine of the common law as to the navigability of waters has no application in this country.

> Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all, of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels which are not even affected by the tide at any point during their entire length. A different test must therefore be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

In the case of the *Montello* (20 Wall., 431–441) Mr. Justice Davis for the court said:

> It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river rather than the extent and the manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact and becomes in law a public river or

> highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are or may become the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of the river.

In the case of *Escanaba* v. *Chicago* (107 U. S., 678–682) the above doctrines are quoted with approval by the court, where it is held that the power vested in the General Government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in fact, when by themselves, or their connections with other waters, they form a continuous channel of commerce among the States or with foreign countries.

In the case of the *Water Power Company* v. *The Water Commissioners* (168 U. S., 349–359) this court, speaking through Mr. Justice Peckham, said:

> In order to be navigable, it is not necessary that it should be deep enough to admit the passage of boats at all portions of the stream.

Red Pass being, then, navigable in fact, in its ordinary stages and by ordinary means, it is a navigable river, and the only remaining question is whether it is a navigable water of the United States. The jury found, and the evidence clearly establishes the fact, that a continuous journey may be made through Red Pass and its connections, in their ordinary stages, by the ordinary means, into the Mississippi River, and thence northward to various States, or southward into the Gulf of Mexico,

and also direct to sea without entering the Mississippi River. (See Record, p. 27, top; p. 29, middle; p. 31, bottom; pp. 36, 37, 38, 40, 57, and 61.) These facts unquestionably make Red Pass a navigable water of the United States.

In the case of the *Daniel Ball* (10 Wall., 557–563) the court, through Mr. Justice Field, after laying it down that rivers are navigable in law which are navigable in fact, continues—

> And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries, in the customary modes in which such commerce is conducted by water.

(See in accord *The Montello* (11 Wall, 411), where the same doctrine is announced by the court through the same learned jurist.

In the case of *The Montello* (11 Wall., 430) it was decided that the navigability of a stream for the purpose of bringing it within the terms "navigable waters of the United States" does not depend upon the mode by which commerce is conducted upon it, as whether by steamers, or sailing vessels, or Durham boats, nor upon the difficulties attending navigation, such as those made by falls, rapids, and sand bars, even though these be so great that while they last they prevent the use of the best means, such as steamboats, for carrying on commerce; but, on the contrary, the test depends upon whether the river in

its natural state is such that it affords a channel for useful commerce by affording transit in itself, or through its connections, to another State or to a foreign country.

In the case of *Escanaba County* v. *Chicago* (107 U. S., 678–682) this court, through Mr. Justice Field, said:

> The power vested in the General Government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in fact, so far as it may be necessary to insure their free navigation, when, by themselves or through their connections with other waters, they form a continuous channel for commerce among the States or with foreign countries.

Citing with approval the case of the *Daniel Ball* (10 Wall., 557).

In *Harmon* v. *The City of Chicago* (147 U. S., 396) the question arose upon the power of the city of Chicago to impose a license tax for the privilege of navigating the Chicago River by steam tugs which had been licensed by the United States, and it was held, in the language of the court, at page 412, that—

> Waters navigable in themselves in a State and connecting with other navigable waters so as to form a waterway to other States or foreign nations can not be obstructed or impeded so as to impair, defeat, or place any burden upon a right to their navigation granted by the Congress.

The latest decision of this court upon this subject is to be found in the case of the *United States* v. *The Bellingham Bay Boom Company*, No. 21 of the present term, decided January 29, 1900. This was a case arising under the act of September 19, 1890, and was instituted by the

Attorney-General filing a bill to enjoin the defendant from further continuing a certain boom which it had constructed across the Nooksack River in the State of Washington, and to obtain the removal of the same as an obstruction to the navigation of that river. In the statement of the case, the court, through Mr. Justice Peckham, says:

> On the trial it appeared that the Nooksack River is a navigable stream, having its source in Whatcom County, State of Washington, and runs through Whatcom County to Bellingham Bay, emptying into that bay, and thence into the Pacific Ocean. The waters of the river lie wholly in Whatcom County, and are navigable from its mouth for a distance of several miles toward its source by light water craft. The boom in question, built by the defendant company at a point just above where the river empties into the bay, is frequently an obstruction to the navigation of the river by steamboats and other craft, as the boom crosses the channel of the river and entirely fills it, excepting that there is what is termed a "trip," which may be opened and vessels pass through the same on their way up and down the river.

This water was held to be a navigable water of the United States, and the boom erected by the defendant company held to be an obstruction of it, which could be abated and removed under the provisions of section 10 of said act of September 19, 1890.

IV.

The fourth, seventh, and ninth assignments of error complain of the refusal of the court to grant the special

instructions requested by the petitioner, which are set out in said assignments of error number four and seven (Record, p. 127), and of that portion of the general charge which is set out in the said ninth assignment of error (Record, p. 128). The object of these assignments of error is to present to the consideration of the court the question whether he State could authorize the closing of this navigable stream in the exercise of its "police power." But under the evidence in this case it is submitted that no such question legitimately arises. As was said by the circuit court of appeals (pp. 140–141):

> There is no evidence in the record tending to show that the police jury of the parish of Plaquemine ordered Red Pass closed for the purpose of "affecting or protecting the peace, morals, education, health, or good order of the people." But the case does show that the pass was ordered closed, and was closed, for the sole purpose of reclaiming swamp land. Under the power to regulate commerce, Congress having forbidden the closing of any navigable water without the consent of the United States, it is very doubtful whether any navigable water of the United States, although wholly within the limits of the State, can be closed, under the exercise of the police power of the State, for any purpose whatever; but where the purpose only is the reclamation of swamp lands there is no doubt the police power of the State must give way to the authority of Congress.

Not only is this true, but the State of Louisiana did not order the erection of this dam at all. There was no legislative enactment or other State authority by which the closing of this pass was ordered. The very most

that is claimed for State authority in the premises is the action of the board of commissioners for the Buras Levee district, but it is submitted that the evidence in this case does not even establish the contention that this board of commissioners ordered the pass closed as an agent or instrumentality of the State, but that, on the contrary, the pass was closed by private individuals for their own private and personal gain in the improvement of their farm lands in the adjacent territory, and, that any claim of authority or direction, either from the State or from any agent or instrumentality of the State, is a mere flimsy pretext, without the slightest foundation in fact. The contention of the court is earnestly invited to pages 84 and 85 of the record, and in connection therewith, to pages 80, 81, 82, and 83. The testimony here referred to is that of George Schomberger, who is the president of this Buras police board, under whose authorization and direction it was claimed that the dam in question was erected. On page 80, in a colloquy between the trial court and counsel for the petitioner, there occurs the following:

> The COURT. Yes, but I want it clearly presented that this Red Pass was not closed by the State of Louisiana.
>
> Mr. LEOVY. We have stated over and over again that the police jury ordered Red Pass to be closed, and appointed a levee syndic to do it; therefore the State did it, through its organized instrumentality, the police jury.

But the witness's testimony, as will now be shown, does not bear out this assertion of his counsel. On page 81

the witness testifies that there was a petition presented to the police jury by a number of property holders to have this pass closed, and on page 83 he testifies that there was no opposition to closing the pass, except by the fishermen; that there had been considerable improvements made in this vicinity and a number of valuable orange orchards were in existence there. On page 84 it is shown that this petition was really brought into existence in 1890, whereas the pass was not closed until 1895, and he testifies that Mr. Leovy, the petitioner, and his father, having large interests in a plantation in this vicinity, presented the resolution authorizing the closing of this pass, and it was understood that whoever should close it should close it at his own risk and at his own expense. On page 85 it is testified that Mr. Leovy paid for the expense of closing this pass personally out of his own private means and that the police jury did not pay for it, and that the witness is positive upon this point. This fact is shown by the resolution itself (Record, p. 118), wherein it is recited that the closing of the pass shall be at the expense of the persons favorable to it and not at the expense of the board of commissioners or of the State. Even in the so-called resolution of ratification (Record, p. 119) there is no pretense of direction on the part of the board of commissioners, but merely the giving of their assent to the closing of the pass at the expense of the person closing it, and the court will observe that the resolution referred to as an authorization for the closing of the pass was had on July 1, 1890, whereas the pass was not closed until November 16, 1895.

The court's attention is further directed to the evidence at pages 49, 54, 75, 76, and 79, all of which is evidence introduced by the petitioner in his defense, and which shows conclusively that the only reason ever assigned for a desire on anyone's part to have this pass closed was the improvement of the orange orchards and agricultural lands in that vicinity, without the slightest pretense that it was necessary for the safety, or health, or well-being of the inhabitants of that portion of the State. No witnesses were introduced to show that the damming of the pass was necessary to insure the health, or the morals, or the safety of the people; no testimony is introduced to show that the existence of this stream created vast "malarial marshes," as dilated upon in counsel's brief, and there is not a line of evidence in the record to show that the pass was ordered closed, or desired to be closed for any other reason than the improvement of private property.

We submit, therefore, that there was no exercise of police power by the State in this matter, nor the necessity for the exercise of any such power. It was closed by private individuals for the pecuniary advantage of the owners of the land in that vicinity; and the argument of counsel concerning the police power of the State is really the argument of an imaginary case, entirely *dehors* the record. This court is not called upon to pass upon any such question. The only question before the court is whether private persons, for their own aggrandizement, for their own private profit, at their own private expense, albeit under the flimsy pretense of the authority of the police jury of a parish of a State, can

dam up a navigable river of the United States in order to improve their farm lands. The answer is plain. The latest decision of this court on this subject is to be found in the case of the *United States* v. *The Bellingham Bay Boom Company*, being No. 21 of the present term, decided January 29, 1900. In that case Mr. Justice Peckham, speaking for the full court, said:

> The power of Congress to pass laws for the regulation of the navigation of public rivers and to prevent any and all obstructions therein can not be questioned. When Congress chooses to act, it is not concluded by anything that the States or that individuals by their authority or acquiescence have done from assuming entire control of the matter and abating any obstructions that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose. The ultimate power of Congress over the whole subject is undoubted. Citing *Willamette Iron Bridge Company* v. *Hatch* (125 U. S., 1) and the numerous authorities collected in that opinion.

In the case of *Henderson* v. *The Mayor of New York* (92 U. S., 259–271), where the contention was made that a State in the exercise of its police power might impose a certain regulation upon the landing of emigrants at the port of New York, this court, through Mr. Justice Miller, said:

> This power, frequently referred to in the decisions of this court, has been, in general terms, somewhat loosely called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because whatever may

be the nature and extent of that power, where not otherwise restricted, no definition of it and no urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.

Nothing is gained in the argument by calling it the police power. Very many statutes, when the authority on which their enactments rest is examined, may be referred to different sources of power, and supported equally well under any of them. * * * It must occur very often that the shading which marks the line between one class of legislation and another is very nice, and not easily distinguishable.

But however difficult this may be, it is clear, from the nature of our complex form of government, that whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall or how closely allied to powers conceded to belong to the States.

In the case of *The New Orleans Gaslight Company* v. *The Louisiana Light Company* (115 U. S., 650, at pp. 661–662), the full court, through Mr. Justice Harlan, quotes with approval the language of the opinion and the decision of the court in *Henderson* v. *The Mayor of New York* (*supra*), and reiterates the doctrine that "No definition of the police power and no urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution."

In the case of *Morgan* v. *Louisiana* (118 U. S., 455–464), the court, through Mr. Justice Miller, said:

> We do not think it necessary to enter into the inquiry whether, notwithstanding this, it is to be classed among those police powers which were retained by the States as exclusively their own and therefore not ceded to Congress. For while it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations and an exercise of the police power, it has been said more than once in this court that even where such powers are so exercised as to come within the domain of Federal authority, as defined by the Constitution, the latter must prevail. Citing the cases referred to *supra*.

See, to the same effect, *Schollenberger* v. *Pennsylvania* (171 U. S., 1).

The authorities relied upon by the petitioner do not in any wise militate against this position. In the case of *Railroad Company* v. *Husen* (95 U. S., 465) the statute in question, which was a statute of the State of Missouri, prohibiting the driving or conveying of any Texas, Mexican, or Indian cattle into the State within certain dates, was held to be unconstitutional, as an attempt to regulate commerce, and the decision of the court and the language of the opinion clearly established the correctness of the doctrines above announced. At pages 471–472, Mr. Justice Strong, for the court, said:

> But whatever may be the nature and reach of the police power of a State, it can not be exercised over a subject confided exclusively to Congress by the Federal Constitution. It can not invade the domain

of the National Government. It was said in *Henderson et al.* v. *Mayor of the City of New York et al.* (*supra*), to "be clear, from the nature of our complex form of government, that whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall or how closely allied it may be to powers conceded to belong to the States."

The case of *Lawton* v. *Steele* (152 U. S., 133) was a fishery case, involving the right of the State of New York to pass a law to preserve from extinction fisheries in the lake waters within its jurisdiction by prohibiting exhaustive methods of fishing or the use of destructive instruments. This is a case which involved the common-law right of fisheries and did not draw in question any conflict between the action of the State and a Congressional enactment. The right of the State to pass laws for the protection of fish and game within its borders is, of course, conceded; the regulations were not regulations which denied the common right of fishing, but were only regulations to prevent the improper use of the privilege and the destruction of the article. By reference to pages 137, 138, and 139 of the opinion in this case, it will be observed that the doctrines above announced are distinctly reaffirmed and adhered to, and the cases above cited referred to with approval. The common-law right of fishery is entirely distinct and separate from the right of navigation, and may or may not exist in the same waters at the same time.

In Gould on Waters (2d edition, section 54) it is said:

> Nature is competent, it has been said, to make a navigable river without the aid of the legislature; and it is now fully established in this country, overruling the earlier decisions, that the public have a right of passage over all fresh-water streams which are by nature susceptible of general use, and that those rivers are public and navigable in law which are navigable in fact. This right of navigation is distinct from the public right of fishery, which may or may not exist in the same waters.

See also *Leconfield* v. *Lonsdale*, L. R., 6, C. P., 665; *People* v. *Platt*, 17th Johns., 195–211.

The case of *Barbier* v. *Connoly* (113 U. S., 27), which is cited by counsel as being an adjudication that it is the exercise of lawful police regulation to drain a sea marsh, falls very short of being an authority for such contention. The case decides that a municipal ordinance prohibiting washing and ironing in public laundries and washhouses within defined territorial limits, from 10 o'clock at night to 6 in the morning, is purely a police regulation, competent to be enacted as an ordinance by a municipality possessed of the ordinary powers, and the case decides nothing more. It is an authority for the validity of such a municipal ordinance and nothing else. The only portion of the opinion that in the slightest degree refers to sea marshes is the dicta which is contained on page 31, as follows: After deciding that the fourteenth amendment did not take away the police power of a State, it is said that, "from the very necessities of society, legislation of a special

character having these objects in view must often be had in certain districts, such as for draining marshes and irrigating arid plains." The opinion in this case was written by Mr. Justice Field, who was also the author of the opinions in several of the cases cited above, in which it was held that a State could not interfere with the navigation of any navigable water of the United States, whether under the pretense of police power or not, and it certainly is not to be supposed that these few words of dicta in this case were intended to cast any doubt upon his previous opinions, especially in view of the fact that no such consideration was before the court, and that the words were merely used as examples of the police power. On the contrary, it is quite plain that the example of the power of a State under its police power to drain sea marshes and irrigate arid plains would be only when those things could be done without interfering with any enactment of Congress over a navigable stream, or any other subject within the jurisdiction of the Congress.

The case of *Withers* v. *Buckley* (20 How., 84), so confidently relied upon by the petitioner, is not in anywise an authority for any contention made in the brief. That is a case in which the court was called upon to determine whether or not a statute of the State of Mississippi for improving the navigation of a river which empties itself into the Mississippi was in conflict with the act of Congress providing for the admission of that State into the Union, which said act guaranteed the free navigation of the Mississippi River. The only question to be determined was whether or not the act of the State operating upon Old River would result in impairing the navigation

of the Mississippi, and the court held that the act of the State did not in anywise relate to the Mississippi River, and that inasmuch as there was to be no effect upon the Mississippi River by the act in question, that the provisions of the act of Congress were not in anywise interfered with, and the act of the State, therefore, lawful. It was also determined as a matter of fact that Old River was not a river which emptied into the Mississippi, and that it was not a navigable stream, the court saying (p. 93):

> With no propriety of language, then, can it be pretended that the contemplated communication between the Homochitto and the Buffalo Bayou would be the violation of a law which declares that the waters of the Mississippi, and the navigable rivers and waters leading into the same, shall be common highways and forever free as well to the inhabitants of the State as to the other citizens of the United States. Old River was once the bed or a portion of the Mississippi, but never a separate navigable river flowing into the Mississippi. Any improvement, therefore, in the facilities of reaching the Mississippi by another river can not be an obstruction in what never was, in any correct sense of the phrase, a navigable river leading or flowing into the Mississippi.

There was not, at the time of the decision in that case, any act of Congress on the general subject of navigable streams, and forbidding them from being obstructed without the consent of the Federal Government, and, therefore, even if the decision could otherwise be regarded as favorable to the contention here, it would only fall within that class of cases which hold that the States may

legislate upon subjects over which the Federal Government has control in the absence of any Federal legislation to the contrary, but that as soon as the Federal Government assumes control over the matter, the Federal act supersedes the State act and nothing done under its authority can be permitted to impede the navigation of the river contrary to such Federal statute. (See Cooley's Const. Lim., 6th ed., p. 722.)

On this branch of the case it is therefore submitted, first, that the State has not dammed this river at all in the exercise of its police power, or any other pretended power, and that it has not done so either by legislative enactment or by authorization of any agent or officer for that purpose, but that, on the contrary, the said dam was erected at the solicitation of private individuals, at their private expense and risk and for their personal aggrandizement; and, second, that even if said dam had been erected directly by the State, under a legislative enactment for that purpose, the act would not, in any proper sense, have been the exercise of the police power by said State, and the legislative authorization to close this navigable water of the United States would have been void and of no effect.

V.

Assignments of error numbers six and ten complain of the refusal of the trial court to instruct the jury as specially requested; that if Red Pass, when closed, was not substantially useful for some purpose of interstate commerce, Federal legislation upon the subject was beyond the power of Congress and void. It is submitted that

substantially the same thing was enumerated in the general charge of the trial judge, and that no possible detriment could have resulted to the petitioner from the failure to give the specific charge here requested. Under assignment of error number ten the contention is made that inasmuch as Red Pass was essentially a stream wholly within the confines of the State of Louisiana it was not one over which the Federal Congress had any jurisdiction. It has already been fully shown that this navigable stream connected with other streams, by means of which a continuous passage could be made to the Mississippi River, and also into the Gulf of Mexico. It follows, therefore, that there is no merit in this contention, and the request was properly refused. And so it is immaterial as to what amount of commerce was being carried on by means of this pass. It is sufficient under the authorities already considered that the pass was in fact or was susceptible of being made a channel for useful commerce. (See Division III of this brief and authorities there collected.)

VI.

By the eleventh assignment of error it is contended that no penalty is imposed by any statute of the United States for the offense of which the petitioner was convicted, because it is argued that the act of July 13, 1892, repealed section 7 of the act of September 19, 1890.

By the act of September 19, 1890 (26 Stats., 454), it is provided:

> That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulk-

head, jetty, or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge draw, bridge piers and abutments, the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State.

The tenth section of the same act provided as follows:

Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall

violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $5,000 or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. The creating or continuing of any unlawful obstruction in this act mentioned may be prevented, and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States.

In the rivers and harbors act of 1892 (27 Stat. L., ch. 158, pp. 88, 110), section 7 of the act of 1890 was amended and reenacted so as to read as follows:

That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters; and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States under any act of the legislative assembly of any State until the location and plan of such bridge or other works have

been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, harbor of refuge, or inclosure within the limits of a breakwater, or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War.

Provided, That this section shall not apply to any bridge, bridge draw, bridge piers, and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, drawbridge, bridge piers, and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven, or harbor, or other navigable water not wholly within the limits of such State.

In the case of *Frost* v. *Wenie* (157 U. S., 46, 58) this court, through Mr. Justice Field, said:

> It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject unless the last statute is so broad in its terms and is so clear and explicit in its words as to show that it was intended to cover the whole subject and therefore to displace the prior statute.

This language is quoted and applied with approval in the case of *Healy* v. *The United States* (160 U. S., at p. 147) and is in accord with the universal doctrine of this

court. (See *United States* v. *Tyncne*, 11 Wall., 88, 93; *Redrock* v. *Henry*, 106 U. S., 596, 601; *Henderson's Tobacco*, 11 Wall., 652; *King* v. *Cornell*, 106 U. S., 395, 396.)

It is submitted, therefore, that the amendment relates only to altering ports, harbors, etc., and otherwise the reenacted section is the same as the original. The intention and effect of the legislation of 1892 was to embody in the act of 1890 the amended and reenacted sections so that the provisions of section 10 of the act of 1890 should apply to the violation of the amended and reenacted section the same as to the violation of section 7 as originally enacted.

Black on the Interpretation of Laws, pp. 356, 357.

In the *addendum* to the brief of counsel for the petitioner reference is made to the act of March 3, 1899 (30 Stats., 1151), as "changing" the policy of Congress upon the subject of regulating obstructions on navigable streams of the United States, and certain "inferences" against the former act are drawn from this alleged "change of policy." It is submitted that there has not been any change of policy on the subject, and that it is as equally necessary to procure the "authorization" or "permission" of the Secretary of War to erect any dam or structure over or upon a navigable water of the United States under the act of 1899 as it was under the act of 1890 or the amendment of 1892. A bare perusal of the act of March 3, 1899 (30 Stats., 1151), proves this. That act is as follows:

> SEC. 10. That the creation of any obstruction not affirmatively authorized by Congress to the navi-

gable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or, where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, canal, lake harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

VII.

CONCLUSION.

In the brief filed by the learned counsel for the petitioners in the circuit court of appeals an imaginative picture of unparalleled evils and misfortunes is drawn, which, it is contended, will be the result of the conviction of the petitioner under this indictment. In answer to this enumerated list of possible calamities the court of appeals (Record, p. 147) said:

> We notice this merely to say that if the picture of evils resulting from maintaining the statute of the United States forbidding the closing of navigable waters is correctly drawn the remedy lies in

Congressional rather than in judicial legislation. It does not appear to us, however, that the enforcement of the Federal statute ought to have any such disastrous and humiliating effects. It is not to be supposed that the Secretary of War will refuse his approval to any reasonable closing of swamp outlets and bayous wholly within or partly within a State whenever the same is necessary, or apparently necessary, to protect the health, morals, or general good of the community interested. It is probable that all that will be necessary will be to apply, showing the apparent need of the work proposed; and such application to the Government controlling the navigable waters of the United States may well be made, and without compromise of dignity by any State officer or board, or even by the State itself.

This, it would seem, is a complete answer to the imaginary evils which the learned counsel have conjured up; but if it is not, it may be further answered in the language of Mr. Justice Harlan, denying an application for rehearing in the case of *American County* v. *Allen* (103 U. S., at p. 515)—

> If, as urged, the result is unfortunate for the county, we can only say, what can not be too often repeated, that hard cases can not be permitted to make bad law.

It is therefore submitted that there was no error committed in the trial and that the judgment of the circuit court for the eastern district of Louisiana should be affirmed.

GEORGE HINES GORMAN,
Special Attorney.

O

177 621
L-ed 914
110 f 190

LEOVY v. UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 238. Argued April 12, 16, 1900.—Decided May 14, 1900.

Subject to the paramount jurisdiction of Congress over the navigable waters of the United States, the State of Louisiana had, under the act of March 2, 1849, c. 87, and the other statutes referred to in the opinion of the court, full power to authorize the construction and maintenance of levees, drains and other structures necessary and suitable to reclaim swamp and overflowed lands within its limits.

The dam constructed by the plaintiff in error at Red Pass was constructed under the police power of the State, and within the terms and purpose of the grant by Congress.

The decision of the jury, to whom it had been left to determine whether the plaintiff in error was guilty, that the pass was in fact navigable, is not binding upon this court.

The term navigable waters of the United States has reference to commerce of a substantial and permanent character to be conducted thereon.

The defendant below was entitled to the instruction asked for, but refused, that the jury should be satisfied from the evidence that Red Pass was, at the time it was closed, substantially useful to some purpose of interstate commerce, as alleged in the indictment.

Upon the record now before the court it is held that Red Pass, in the condition it was when the dam was built, was not shown by adequate evidence to have been a navigable water of the United States, actually used in interstate commerce, and that the court should have charged the jury, as requested; that upon the whole evidence adduced, the defendants were entitled to a verdict of acquittal.

Statement of the Case.

At the April term of the Circuit Court of the United States for the Eastern District of Louisiana an indictment was found, charging Augustus F. Leovy and Robert S. Leovy, both of the parish of Plaquemines, State of Louisiana, with, on the 16th of November, 1895, unlawfully, wilfully, knowingly and without permission of the Secretary of War, building and causing to be built a dam in and across a certain navigable stream of the United States known as Red Pass, and outside of any established harbor lines, which said Red Pass flows in the Gulf of Mexico from a certain navigable stream of the United States, known as the Jump, which said Jump is an outlet of the Mississippi River into the Gulf of Mexico; that said dam has been continued by the defendants since the same was built, and still remains in and across said Red Pass, whereby the navigation of and commerce over and through Red Pass was then and there, and has been ever since, impaired and obstructed; they, the said defendants, well knowing the said Red Pass to be a navigable stream of the United States, in respect of which the United States then and there had jurisdiction, contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

The defendants entered a plea of not guilty; and the cause was tried before the district judge, and a jury. The trial resulted, June 6, 1891, in a verdict of not guilty as to Augustus F. Leovy, and of guilty as to Robert S. Leovy; whereupon it was adjudged that said Robert S. Leovy pay a fine of two hundred dollars and costs of prosecution.

Several bills of exception on behalf of Robert S. Leovy were seasonably presented, and signed and allowed by the trial judge, who, likewise, on June 16, 1898, allowed a writ of error, and the cause was taken to the United States Circuit Court of Appeals, for the Fifth District, which court, on February 28, 1899, affirmed the judgment of the Circuit Court.

The case was then brought to this court on a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Victor Leovy for Leovy. *Mr. Henry J. Leovy* and *Mr. Alexander Porter Morse* were on his brief.

Mr. George Hines Gorman for the United States.

Mr. Justice Shiras, after making the above statement, delivered the opinion of the court.

On March 2, 1849, the Congress of the United States by an act of that date, c. 87, entitled "An act to aid the State of Louisiana in draining the swamp land therein," enacted: "That to aid the State of Louisiana in constructing the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, which may be or are found unfit for cultivation, shall be, and the same are hereby, granted to that State." 9 Stat. 352.

Similar grants have been made by Congress to other States within whose boundaries were undrained swamp and overflowed lands belonging to the United States. Act of September 28, 1850, c. 84; 9 Stat. 519. This legislation declares a public policy on the part of the government to aid the States in reclaiming swamp and overflowed lands, unfit for cultivation in their natural state, and is a recognition of the right and duty of the respective States, in consideration of such grants, to make and maintain the necessary improvements.

By the act of September 13, 1890, c. 907, 26 Stat. 436, 454, it is provided:

"That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead.

haven, harbor, navigable river or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of the channel of said navigable waters of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge draw, bridge piers and abutments, the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State."

The tenth section of the same act provided as follows:

"Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $5000 or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. The creating or continuing of any unlawful obstruction in this act mentioned may be prevented, and such obstruction may be caused to be removed by the injunction of any Circuit Court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney General of the United States."

In the river and harbor act of July 13, 1892, c. 158, 27 Stat. 88, 110, section 7 of the act of 1890 was amended and reënacted so as to read as follows:

"That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may

be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce or anchorage of said waters; and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river of navigable waters of the United States under any act of the legislative assembly of any State until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, harbor of refuge, or inclosure within the limits of a breakwater, or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War. *Provided*, That this section shall not apply to any bridge, bridge draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, drawbridge, bridge piers and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State."

Subject, then, to the paramount jurisdiction of Congress over the navigable waters of the United States, the State of Louisiana has full power to authorize the construction and maintenance of levees, drains and other structures necessary and suitable to reclaim swamp and overflowed lands within her limits. The pivotal question in the present case is whether Red Pass is a navigable water of the United States in such a sense that a dam erected therein for the purpose, and with the effect, of reclaiming overflowed lands and rendering them fit for cultivation, could be constructed without the previous authorization of the Secretary of War, it being admitted that no such authority was ever applied for or procured.

Evidence was tendered, on behalf of the defendants, tending to show that the dam in question was built by Robert S. Leovy,

who was the syndic or official of the contiguous ward, in pursuance of a resolution of the police jury of the parish of Plaquemines, dated July 1, 1890, directing such syndic to have Red Pass closed, and also tending to show an approval and ratification of the work by the levee board of the district and by the police jury at a meeting held February 8, 1898, and a direction to the attorney of the board to take such steps as should be necessary to prevent said Red Pass from being reopened. Some of these offers were rejected by the trial court, and exceptions were taken by the defendants. It is evident, however, that the court rejected the offers only because it was the opinion of the court that such evidence was immaterial, inasmuch as if Red Pass was not a navigable water of the United States, within the meaning of the statutes, the defendants would be entitled to a verdict of not guilty, regardless of the action of the police jury and of the levee board; and if Red Pass was such a navigable stream, the action of the state or parish authorities, unauthorized by the Secretary of War, would not avail the defendants. Indeed, the trial judge, in his charge, instructed the jury, as if the evidence had been admitted, in the following terms:

"I charge you that the police jury of the parish had no right to authorize Mr. Robert S. Leovy to dam Red Pass, if Red Pass was a navigable water of the United States. I say that it had no authority, because, in the year 1890, the Congress of the United States passed the law under which this indictment has been brought, forbidding the damming of any navigable stream of the United States without the previous authorization of the Secretary of War. Therefore, as it is not contended, in this case, that there was any authority from the Secretary, but on the contrary there is proof tending to show there was no such authority, then it results that it is no defence for Mr. Robert S. Leovy to show his pretended or alleged authority from the police jury of the parish of Plaquemines. The police jury could not legally have dammed it, and therefore Mr. Leovy could not."

We think, therefore, that we are warranted in regarding the dam in question as constructed under the police power of the State, and within the terms and purpose of the grant by Congress. There was evidence tending to show the character of

the country affected by floods from Red Pass — that it was swamp land and sea marsh from the Mississippi River to the Gulf. The testimony, enclosed in the record, of Shoenberger, president of the police jury and of the levee board; of Lewis, of the state board of engineers; of Wilkinson, ex-president of levee board, and of De Armas, showed that the closing of this pass has resulted in the redemption of large tracts of land, greatly increasing their value; that the property in the fifth ward, before Red Pass and Spanish Pass were closed, was valued at $5000, and at this time it is valued at $100,000; and that if those passes are kept closed for five years more it will be three times as much; and that, if this pass be opened again, by the removal of the dam, the orange property will be ruined.

It is conceded that Red Pass is not a natural stream, but is in the nature of a crevasse, caused by the overflow of water from the Mississippi River. This crevasse seems to have been formed some time before the grant by the United States to Louisiana, and the fact that by this and similar breaks through the banks of the river large tracts of land were rendered worthless, was, it may be assumed, well known to Congress, and was, indeed, the actuating cause of the grant.

As respects navigation through Red Pass, there was some evidence, on the part of the government, that small luggers or yawls, chiefly used by fishermen to carry oysters to and from their beds, sometimes went through this pass; but it was not shown that passengers were ever carried through it, or that freight destined to any other State than Louisiana, or, indeed, destined for any market in Louisiana, was ever, much less habitually, carried through it.

The evidence on the part of the defendants showed that for many years these crevasses or passes have been steadily growing shallower and narrower, and that at the time of closing Red Pass few of the smallest craft attempted to pass through it, and that the so-called mouth, or end of Red Pass next the Gulf, had closed up and become a mere marsh. The trifling use that was made of that pass was restricted to the river end of the crevasse.

We cannot accept the contention of the government's counsel

that, because the jury was left to determine whether the pass was in fact navigable, and found the defendant guilty, the decision of the jury is binding upon the appellate court. We have a right to consider under what instructions and definitions, given by the trial court, the jury found their verdict.

Before we examine the charge of the court, we shall briefly review some of the cases from which may be derived a definition of "navigable waters of the United States," within the meaning of the statutes under which this indictment was brought.

In the case of *Boylan* v. *Shaffer*, 13 La. Ann. 131, it was said by the Supreme Court of the State of Louisiana:

"Were the mere fact that steamboats or flatboats had been a short distance up a stream or bayou in high water a sufficient ground for declaring it a navigable stream, every slight depression on the banks of the Mississippi would then become a navigable stream, and should be opened for the benefit of rafts and boats and the convenience of a few persons, to the total destruction of the planting interests on the banks of the river. It is well known that the State has, for a number of years, been closing the small bayous making out of the principal rivers and bayous, and thus redeeming large and valuable tracts of land."

In the case of *Egan* v. *Hart*, 45 La. Ann. 1358, there was considered the right of the board of state engineers of the State of Louisiana to build a dam across an alleged stream, designated as Bayou Pierre. It was alleged that it was a purely private undertaking which the board of state engineers was not authorized to do at public expense, and that the dam would obstruct the navigation of Bayou Pierre, and would therefore violate the statute of Congress which forbade the construction of any bridge or other works over or in any navigable waters of the United States, unless approved by the Secretary of War. The trial judge, as to the contention that Bayou Pierre was a navigable stream, said:

"From Grande Ecore, where Bayou Pierre enters Red River, to a point some miles below its junction with Torre's Bayou, a stream flowing out of the river, Bayou Pierre has been frequently navigated by steamboats. But from the point of junction to the dam in question it has never been navigated, and is

unnavigable. Between these two points it is nothing but a high-water outlet, going dry every summer at many places, choked with rafts and filled with sand, reefs, etc. It has no channel; in various localities it spreads out into shallow lakes and over a wide expanse of country, and is susceptible of being made navigable just as a ditch would be if it were dug deep and wide enough and kept supplied with a sufficiency of water."

And accordingly it was found by the trial court that Bayou Pierre was not a navigable water of the United States. Its judgment was affirmed by the Supreme Court of Louisiana, and the case was brought to this court and the judgment of the court below affirmed. *Egan* v. *Hart*, 165 U. S. 188.

In *Lake Shore & Michigan Southern Railway* v. *Ohio*, 165 U. S. 365, a judgment of the Supreme Court of Ohio, affirming a judgment of a trial court, whereby the defendant, an Ohio corporation, was directed to absolutely remove a bridge or modify its structure over the Ashtabula River, a stream wholly within the State of Ohio, was brought to and affirmed by this court. The case was thus stated in the opinion delivered by Mr. Justice White:

"Both the pleadings and the errors here assigned deny the jurisdiction of the State of Ohio or of its courts to control the subject-matter of the controversy, on the theory that the determination of whether the defendant possessed the right to erect the bridge and to continue it, although constructed without authority, is a Federal and not a state question. This contention is predicated on the act of Congress of September 19, 1890, (26 Stat. 423).

"The contention is that the statute in question manifests the purpose of Congress to deprive the several States of all authority to control and regulate any and every structure over all navigable streams, although they be situated wholly within their territory. That full power resides in the States as to the erection of bridges and other works in navigable streams wholly within their jurisdiction, in the absence of the exercise by Congress of authority to the contrary, is conclusively determined." *Wilson* v. *Blackbird Creek*, 2 Pet. 245; *Withers* v. *Buckly*, 20 How. 84; *Cardwell* v. *American Bridge Co.*, 113 U. S. 205;

Willamette Bridge Co. v. *Hatch*, 125 U. S. 1; *Shively* v. *Bowlby*, 152 U. S. 33, and cases there cited.

"Indeed the argument at bar does not assail the rule settled in the foregoing cases, but asserts that as the power which it recognizes as existing in the States is predicated solely upon the failure of Congress to assert its paramount authority, therefore the rule no longer obtains, since the act of 1890, relied on, substantially amounts to an express assumption by Congress of entire control over all and every navigable stream, whether or not situated wholly within a State."

After quoting the language of the statute, the opinion proceeded:

"On the face of this statute, it is obvious that it does not support the claim based upon it. Conceding, without deciding, that the words 'water-ways of the United States,' therein used, apply to all navigable waters, even though they be wholly situated within a State, and passing, also without deciding, the contention that Congress can lawfully delegate to the Secretary of War all its power to authorize structures of any kind over navigable waters, nothing in the statute gives rise even to the implication that it was intended to confer such power on the Secretary of War. . . . It follows, therefore, that even conceding, *arguendo*, that the words 'navigable waters,' as used in the act, were intended to apply to streams wholly within a State, its obvious purpose was not to deprive the States of authority to grant power to bridge such streams, or to render lawful all bridges previously built without authority, but simply to create an additional and cumulative remedy to prevent such structures, although lawfully authorized, from interfering with commerce."

In the case of *The Daniel Ball*, 10 Wall. 557, the following definition of the term "navigable waters" was expressed:

"Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tidewater, and some of them are navigable for great distances by large vessels which are not even affected by the tide at any point during their entire length. A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their

navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

In the case of *The Montello*, 20 Wall. 430, 441, the following language was used:

"The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river."

In *Withers* v. *Buckley*, 20 How. 84, this court said:

"The act of Congress of March 1, 1817, in prescribing the free navigation of the Mississippi and the navigable waters flowing into this river, could not have been designed to inhibit the power inseparable from every sovereign or efficient government, to devise and to execute measures for the improvement of the State, although such measures might induce or render necessary changes in the channels or courses of rivers within the interior of the State, or might be productive of a change in the value of private property."

"Neither the Fourteenth Amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its 'police power,' to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having those objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains." *Barbier* v. *Connolly*, 113 U. S. 27.

It is a safe inference from these and other cases to the same effect which might be cited, that the term, "Navigable waters of the United States," has reference to commerce of a substantial and permanent character to be conducted thereon. The power of Congress to regulate such waters is not expressly granted in the Constitution, but is a power incidental to the express "power to regulate commerce with foreign nations, and among the several States and with the Indian tribes;" and with reference to which the observation was made by Chief Justice Marshall, that "it is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Gibbons* v. *Ogden*, 9 Wheat. 1, 194.

While, therefore, it may not be easy for a court to define the size and character of a stream which would place it within the category of "navigable waters of the United States," or to define what traffic shall constitute "commerce among the States," so as to make such questions sheer matters of law, yet, in construing the legislation involved in the case before us, we may be permitted to see that it was not the intention of Congress to interfere with or prevent the exercise by the State of Louisiana of its power to reclaim swamp and overflowed lands by regulating and controlling the current of small streams not used habitually as arteries of interstate commerce.

The trial judge instructed the jury as follows:

"What is a navigable water of the United States? It is a navigable water which, either of itself, or in connection with other water, permits a continuous journey to another State. If a stream is navigable, and from that stream you can make a journey by water, by boat, by one of the principal methods used in ordinary commerce, to another State from the State in which you start on your journey, that is a navigable water of the United States. It is so called in contradistinction to waters which arise and come to an end within the boundaries of the State. . . . But, if from the water in one State you can travel by water continuously to another State, and the water is a navigable water, then it is a navigable stream of the United

States. . . . If it was navigable, and connected with waters that permitted a journey to another State, then it is a navigable water of the United States." And again: "But the fact I wish to impress upon you is this, that it is not absolutely necessary that you should find that there was navigability all the way from the Jump out to the Gulf, because if, from some point beyond the place where Mr. Robert S. Leovy built this dam, towards the Mississippi River, the stream was navigable, then it would be a navigable stream of the United States, because it would connect with the Mississippi River."

If these instructions were correct, then there is scarcely a creek or stream in the entire country which is not a navigable water of the United States. Nearly all the streams on which a skiff or small lugger can float discharge themselves into other streams or waters flowing into a river which traverses more than one State, and the mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, the jury is informed, is sufficient to constitute a navigable water of the United States.

Such a view would extend the paramount jurisdiction of the United States over all the flowing waters in the States, and would subject the officers and agents of a State, engaged in constructing levees, to restrain overflowing rivers within their banks, or in regulating the channels of small streams for the purposes of internal commerce, to fine and imprisonment, unless permission be first obtained from the Secretary of War. If such were the necessary construction of the statutes here involved, their validity might well be questioned. But we do not so understand the legislation of Congress. When it is remembered that the source of the power of the general government to act at all in this matter arises out of its power to regulate commerce with foreign countries and among the States, it is obvious that what the Constitution and the acts of Congress have in view is the promotion and protection of commerce in its international and interstate aspect, and a practical construction must be put on these enactments as intended for such large and important purposes.

We also think that these instructions are open to the further

criticism that they contain no reference to the nature or extent of the traffic or trade carried on in Red Pass before the erection of the dam. Indeed, the charge necessarily implies that the defendant was guilty if there was merely a capacity for passing from Red Pass into the Mississippi River on any sort of a boat. Very different was the view expressed by Chief Justice Shaw when he said it is not "every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable, but in order to give it the character of a navigable stream it must be generally and commonly useful to some purpose of trade or agriculture." 21 Pick. 344.

We have read the testimony offered on behalf of the United States to show the kind and extent of the navigation of the Red Pass, and there is no view we can take of it that warranted the jury in finding that interstate commerce was ever transacted thereon. A few fishermen testified that they occasionally went through this pass with small vessels, carrying oysters for planting, and one or two cargoes of willows and timber were spoken of. None of these witnesses pretended to have carried produce or oysters out of the State. Nor can it be contended that the Red Pass, at the time the dam was built, was open to the Gulf. It was shown that the Gulf end of the pass had closed up, so that to get to the sea it was necessary to go out of Red Pass into Tiger Pass, Tontine Pass, and Grand Pass, which are open to the Gulf. And, accordingly, the trial judge instructed the jury that it was not necessary, in order to find Red Pass to be a navigable water of the United States, that they should find that it was navigable out to the Gulf; that it was sufficient if boats could reach the Mississippi River.

We think the defendant was entitled to the instruction asked for, but refused, that the jury should be satisfied from the evidence that Red Pass was at the time it was closed, as alleged in the indictment, substantially useful to some purpose of interstate commerce. The instruction actually given was as follows:

"If Tontine Pass and Red Pass are available for commerce and navigation by means of luggers and oyster boats for the purpose of useful commerce, it would be a navigable stream; and if you find that it connected with other waters over which

a continuous journey could be made to other States, then it would be a navigable water of the United States.

"I repeat to you that, under my view of the case, all you have to decide is whether Red Pass was a navigable water of the United States, and as you decide that the case will go, because it is conceded that Mr. Leovy dammed it."

It is plain, therefore, that the attention of the jury was not directed at all to the question of any existing interstate commerce, and that the learned judge was of opinion, and so ruled, that the physical possibility of passing by a boat out of Red Pass into the Mississippi River constituted the pass a navigable water of the United States.

The court refused to give the following instruction:

"If the jury shall find that Red Pass was a crevasse, or outbreak, of the Mississippi River from its natural channel, the result of which was to overflow a large portion of Plaquemines Parish, to the detriment of the inhabitants thereof, by the destruction of their property, and prejudicial to their health, the State, in the exercise of its police power, delegated to the police jury of the parish of Plaquemines, had a right to close it."

Perhaps this instruction ought to have been qualified or accompanied by a prayer that the acts of Congress, relied on by the government, were not applicable to the case suggested in the instruction asked for. But we think, in the circumstances disclosed by the evidence, the instruction should have been given, at least as so qualified.

The Circuit Court of Appeals, in dealing with the error assigned for the refusal of the trial judge to so charge, said:

"There is no legitimate evidence in the record tending to show that the police jury of the parish of Plaquemines ordered Red Pass closed for the purpose of 'affecting or promoting the peace, morals, education, health or good order of the people;' but the case does show that the pass was ordered closed, and was closed, for the sole purpose of reclaiming swamp lands. Under the power to regulate commerce, Congress having forbidden the closing of any navigable river without the consent of the United States, it is very doubtful whether any navigable water of the United States, although wholly within the limits

of the State, can be closed under the exercise of the police power of the State for any purpose whatever, but where the purpose is only the reclamation of swamp lands, there is no doubt the police power of the State must give way to the authority of Congress."

We think that the trial court might well take judicial notice that the public health is deeply concerned in the reclamation of swamp and overflowed lands. If there is any fact which may be supposed to be known by everybody, and, therefore, by courts, it is that swamps and stagnant waters are the cause of malarial and malignant fevers, and that the police power is never more legitimately exercised than in removing such nuisances. The defendant was not deprived of the defence that the act which he was charged with was performed in order to promote the health of the community, by the fact, if fact it was, that the order under which he acted did not say anything about the subject of health, but simply authorized the erection of the dam, so as to exclude the overflow from the river.

Nor are we disposed to concur in the doubt expressed whether any navigable water wholly within the limits of a State can be closed under the exercise of the police power for any purpose whatever. Such a doubt might be justified if there was express legislation of the United States forbidding the act proposed. But, as we have seen, in the present case the reclamation of swamp and overflowed lands was not only not forbidden, but was recognized as the duty of the State, in consideration of the grant of the public lands. And, for the reasons already given, we do not construe the acts of Congress under which this indictment was brought as intended to apply to the case of a stream of the history and character disclosed in this record. Hence, the state authorities were left free to act in such a manner as they thought fit to promote the health and prosperity of the people concerned.

It can scarcely be contended that if, by a sudden breach of the banks of the Mississippi River in the lowlands of Louisiana, a stream of water across agricultural lands was created, endangering the health and welfare of the inhabitants, the case

would be within the meaning and operation of the acts of Congress relied on in this case. It may be that in such a case, if the State declines to act or, rather, permits such a stream to become a highway of commerce among the States, the Federal control over it might attach. Thus Grand Pass, of which Red Pass is a branch, might, in view of the volume of its water and of the nature and amount of the commerce carried on it, be held to be a navigable water of the United States. However that may be, our conclusion, upon the record now before us, is that Red Pass, in the condition it was at the time when this dam was built, was not shown by adequate evidence to have been a navigable water of the United States, actually used in interstate commerce, and that the court should have charged the jury, as requested, that, upon the whole evidence adduced, the defendants were entitled to a verdict of acquittal.

It is claimed by the counsel for the plaintiff in error that the act of July 13, 1892, so far amended and repealed the act of September 19, 1890, that the penal section of the latter was repealed, and that hence, as no penalty is provided in the act of 1892, the indictment and conviction of the plaintiff in error was without authority of law. It is also contended that the policy of Congress, in respect to the authority of the Secretary of War in the matter of obstruction to navigation, has been greatly changed and modified by the act of March 3, 1899. Fifty-fifth Cong. Session 3, Ch. 425, sec. 9, p. 1151.

It is also suggested that whatever may be the powers of Congress, over streams wholly within the State, they cannot be legitimately enforced by criminal prosecution of officers and agents of the State for acts done under state authority, but that, in such cases, the proper remedy would be found in bills in equity.

But in the view we take of the case in hand, we are not called upon to express any opinion on such questions.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is likewise reversed, and the cause is remanded to that court, with directions to award a new trial.